SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 164

MORRY LEVINE, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., DECEMBER 4, 1959

[fol. A] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CRIMINAL No. C 152-292

THE UNITED STATES, Appellee,

against

MORRY LEVINE, Defendant-Appellant.

Appendix to Appellant's Brief—Filed June 25, 1957

[fol. 1]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Crim. No. C 152-292

THE UNITED STATES

vs.

MORRY LEVINE

DOCKET ENTRIES

Violation—Contempt of Court. Refusal to answer questions before Grand Jury.

Date—4-23-57
Name—M. L. Levine
Amt. Rec'd—$5—

Date—4-26-57
Name—pd U. S. Treas.
Disb.—$5—

Date	Proceedings
4-22-57	Morry Levine having been directed by the Court to answer certain questions put to him by the Grand Jury, and having refused to answer said questions, the government moves to have Morry Levine adjudged guilty of contempt of Court. The Court adjudges the witness Morry Levine guilty of contempt of Court and imposes a sentence of One Year at a place of confinement to be designated by the Atty. Genl. Bail fixed at $5000. pending appeal. Paroled until 4-23-57 at 3 PM to give bail. RICHARD H. LEVET, J.

Date	Proceedings
4-23-57	Filed certificate and Order adjudging Morry Levine guilty of contempt of Court and sentencing him to imprisonment for a period of one year at a place of confinement to be designated by the Atty. Genl. LEVET, J.

[fol. 2]

4-23-57	Issued certified copies of order to the U.S. Marshal.
4-23-57	Filed notice of appeal to the US CA.
4-23-57	Filed order extending the bail limits of Morry Levine. Consented to by U.S. Atty. and Surety. LEVET, J.
5-2 -57	Filed a true copy of an order filed and entered on 4-23-57 Levet, J. Released on $5,000 Bail by Comm. Bishopp on 4-23-57.
May 16, 1957	Filed Transcript of record of proceedings, dated 4/18; 22/57

[fol. 3]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ORDER OF CONTEMPT—April 23, 1957

Morry Levine, having appeared before the United States Grand Jury for the Southern District of New York on April 18, 1957, and having refused to answer certain questions, and on April 18, 1957, a hearing having been had, and Wegman, Epstein & Burke, Esqs., Myron L. Shapiro, Esq., of counsel, for the defendant, and Paul W. Williams, United States Attorney for the Southern District of New York, by Herbert M. Wachtell, Assistant United States Attorney, of counsel, for the United States of America, having been heard, and the defendant having been directed to answer said questions by the Honorable Richard H. Levet, United States District Judge for the

Southern District of New York; and the defendant having again appeared before the United States Grand Jury for the Southern District of New York on April 22, 1957, and having refused to answer said questions as directed by the Court, and having again appeared before the Honorable Richard H. Levet on April 22, 1957, and having refused to answer said questions when put to him by the Court; and Wegman, Epstein & Burke, Esqs., Myron L. Shapiro, Esq., of counsel, for the defendant, and Paul W. Williams, United States Attorney for the Southern District of New York, by Herbert M. Wachtell, Assistant United States Attorney, of counsel, for the United States of America, having been heard, and due deliberation having been had thereon, and upon all proceedings heretofore had herein; it is

ORDERED, that in pursuance of Rule 42(a) of the Federal Rules of Criminal Procedure, the defendant, Morry Levine, [fol. 4] hereby is found to be in contempt of this Court for violation of Title 18, United States Code, Section 401 (3), and is hereby committed to the custody of the Attorney General, or his authorized representative, for imprisonment for a period of one year.

Dated: New York, N. Y., April 23rd, 1957.

Richard H. Levet, U. S. D. J.

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CERTIFICATE OF JUDGE LEVET—April 23, 1957

In accordance with Rule 42(a) of the Federal Rules of Criminal Procedure, I hereby certify that the following acts were committed in the presence and the hearing of the Court and constitute a contempt of the Court:

On April 18, 1957, the defendant Morry Levine was brought before me and in the presence of the United States Grand Jury for the Southern District of New York, cer-

tain questions were read, and the defendant claiming that he was privileged to refuse to answer said questions on the ground of self-incrimination, and after a hearing was had in which it was established that the said Grand Jury was conducting an investigation under Chapter 8 of Title 49, United States Code, and that the said defendant had been called to testify as a witness in the said investigation, [fol. 5] and after hearing arguments by Wegman, Epstein & Burke, Esqs., Myron L. Shapiro, Esq., of counsel, for the defendant, and Paul W. Williams, United States Attorney for the Southern District of New York, by Herbert M. Wachtell, Assistant United States Attorney, of counsel, for the United States of America, and in view of the provisions of Title 49, United States Code, Sections 46 and 305(d), I directed the defendant to answer those questions.

On April 22, 1957, Morry Levine was again brought before me and in the presence of the United States Grand Jury for the Southern District of New York, I put to him the same questions which he refused to answer after having been directed to do so and failed to state any valid reason why he should not be held in contempt of this Court. The questions which were asked are as follows:

"Q. Are you associated with Young Tempo, Incorporated?

Q. Does Young Tempo, Incorporated, use a trucking company known as the T and R Cutting Company or as the T & R Trucking Company?

Q. Who do you know to be the owner or owners or the principal in interest or principals in interest of the T and R Cutting or the T and R Trucking Company?

Q. Mr. Levine, are you associated with the Acme Dress Company in Midvale, New Jersey?

Q. Mr. Levine, does the T and R Trucking Company provide trucking services between Young Tempo, Incorporated, in New York City and the Acme Dress Company in Midvale, New Jersey?

Q. Mr. Levine, do you know if the T and R Trucking Company or the T and R Cutting Company has [fol. 6] applied for or obtained a permit from the Interstate Commerce Commission to operate as a

contract trucker between New York, New York, and Midvale, New Jersey?"

Accordingly, in pursuance of Rule 42(a) of the Federal Rules of Criminal Procedure, I summarily found Morry Levine in contempt of this Court and committed him to the custody of the Attorney General or his authorized representative for imprisonment for a period of one year.

Dated: New York, N. Y., April 23rd, 1957.

Richard H. Levet, U. S. D. J.

[fol. 7]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Proceedings of April 18, 1957

Before Hon. Richard H. Levet, District Judge.

New York, April 18, 1957.

APPEARANCES:

Paul W. Williams, Esq., United States Attorney, for the Government; by Herbert M. Wachtell, Esq., and Charles H. Miller, Esq., Assistant United States Attorneys.

Myron L. Shapiro, Esq., Attorney for the Witness.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Off the record.

(Discussion off the record.)

Mr. Wachtell: The April regular 1957 Grand Jury requests the aid and assistance of the Court, in a direction to a witness, Morry Levine, who has this morning appeared before the Grand Jury and declined to answer certain questions that have been put to him.

The Clerk: What is the name of the witness?

Mr. Wachtell: Morry Levine.

If I may further state for the record, Mr. Levine is represented by Mr. Myron Shapiro, an attorney of this

city, that Mr. Shapiro has previously, two weeks ago, in this Court, represented Mr. Emanuel Brown, a witness who was similarly situated to Mr. Levine.

I will say that the Government in this matter will request the Court that the identical procedure be followed [fol. 8] as was followed in the case of Mr. Brown, and I wish to state that it is the Government's understanding of these proceedings, as previously stated, and understood by Mr. Shapiro, on the hearing, at the time of the hearing as to Mr. Brown.

The Court: I am inclined to follow the same general procedure.

Mr. Shapiro: If your Honor please, am I to understand that this is the only hearing which we will have?

Mr. Wachtell: That is the Government's position.

The Court: As far as I can see, yes. If the witness testifies, there will be no further hearing. If he does not testify, he will be returned here and directed to answer these specific questions.

Mr. Wachtell: I will state that in this case of Mr. Levine the subpoena was originally served upon March 27, 1957; that an adjournment was then had as a result of a conversation between Mr. Shapiro and myself; that a letter was sent last Friday by the United States Attorney's office requesting the appearance of Mr. Levine today.

Particularly in view of the prior proceeding with Mr. Brown and the argument that was had before this Court, as well as an argument which was had before the Court of Appeals on a bail motion as to Mr. Brown, I believe that Mr. Shapiro is well advised of the nature of the proceeding that the Government would contemplate in this case should the witness decline to answer questions, and that therefore has had full and adequate opportunity to prepare any evidence or legal arguments that he would wish to advance at this hearing.

The Court: Yes.

Mr. Shapiro: If your Honor please, at this time, in view of the statement of the Assistant United States [fol. 9] Attorney that this is the only hearing that Mr. Levine will receive, I apply for an adjournment, for a notice under Rule 42 of the Federal Rules of Criminal

Procedure, for a specification of charges and for an opportunity to prepare for the trial.

The requirement of due process, I submit, compels the granting of such an adjournment.

Now in addition to that, I request the Court to grant this witness compulsory process from the Court to require the production and the attendance of witnesses and evidence so that we can meet the issues of fact on this hearing. The issues of fact, as I see it, among others, are: 1, whether this is genuinely an investigation under the Motor Carriers' Act, Chapter 8 of the Interstate Commerce Act. On that point, on that issue, I would have to subpoena, I believe, I request the Court to grant such a subpoena, Paul Williams, United States Attorney in this District all the minutes, all the Grand Jury minutes of this investigation so that we can determine from the Grand Jury minutes whether this is in reality an investigation under the Motor Carriers' Act.

I would like to subpoena the Interstate Commerce Commission and the Justice Department to determine whether this investigation has been directed for the purpose of investigating the violation or a purported violation under the Motor Carriers' Act.

I would request the production, through subpoena, of the charge by the Court, if any, to this Grand Jury and also the production of the interrogation of the Grand Jurors at the time of the impanelling of the Grand Jury, if there was any, by the United States Attorney.

I would respectfully call to the Court's attention the fact that Rule 6 of the Federal Rules of Criminal Procedure and the Constitution of the United States entitle [fol. 10] this witness to compulsory process from the Court and an opportunity and time to serve the same and to obtain the witnesses and the testimony on another issue in this case as to whether the purported immunity claimed to be extended to the witness under sections of the Interstate Commerce Act is co-extensive with his privilege against self-incrimination and for that purpose I respectfully request the Court to compel the production of the Grand Jury minutes of the other Grand Juries before which this witness has appeared on this other subpoena,

maybe ten or eleven times, so that it can be determined by the Court after examination of the minutes whether the immunity purported to be granted here is co-extensive with the privilege.

Another issue—

The Court: How is that to be determined?

Mr. Shapiro: I beg your pardon?

The Court: How would that determine it?

Mr. Shapiro: That would be determined in this way, your Honor: In the other Grand Jury proceedings this man was told by the Assistant United States Attorney, Mr. Wachtell, that he is going to be indicted, that he is a prospective defendant.

The Court: We went all over that question before. I still do not see what he said or did not say at the other Grand Jury investigations has anything to do with the extent of immunity before this Grand Jury. What he says here is immune, under the statute, which we referred to there.

Mr. Shapiro: I am entitled to make and establish our grounds and position here, your Honor.

The Court: You may.

Mr. Shapiro: We cannot determine this man's case by reference to what happened with respect to the witness [fol. 11] Brown. This man is here on a separate charge and is entitled to have the record made to his best advantage, especially where we are told that this is the only hearing that we are going to have. Another issue of fact which we have to present evidence on, or the Government has to present evidence and we have to be prepared to meet is the issue as to whether the questions are incriminatory.

I say to your Honor that the existence of these issues entitle and make clear that the witness is entitled for time, for adjournment, for notice to enable him to prepare for the hearing, and that he is entitled to compulsory process.

Now I would like to advert, if your Honor please, to the whole question of procedure. I respectfully submit to the Court that this procedure followed in this District and followed by your Honor or stated by your Honor that you

will follow in this matter is bad because it is violative of Rule 42(b) and violative of the due process clause of the Constitution. Under both provisions Mr. Levine is entitled to notice, a statement of essential facts constituting the alleged criminal attempt and a reasonable time for preparation.

I respectfully state that for those reasons that the matter should be adjourned so that the Government can prepare the proper notice, so that we can obtain the compulsory process necessary to meet the issues and so that we can prepare for the hearing.

The Court: The motion or application with respect to adjournment is denied. I do not believe that it is necessary under the circumstances and I therefore adhere to the proposed procedure. As far as the other matters are concerned, with respect to the production of witnesses and papers, I will listen to Mr. Wachtell.

[fol. 12] Mr. Wachtell: The Government, your Honor, will take no issue with the abstract principle that counsel in this hearing is entitled to call witnesses and may be entitled to utilize the subpoena power of the Court to have witnesses produced here. It should be noted that no subpoenas have been issued in this case on behalf of counsel, although this hearing has obviously been contemplated for some time. This is not an indigent defendant, and where the Rule requires the Court to issue the subpoenas at the Government expense.

Now, putting to one side the question of the availability of the subpoena power and the means by which the subpoena should be issued in this case, I submit to the Court that counsel for Mr. Levine has made it quite clear that the proof that he proposes to bring out by the witness and documents is completely irrelevant to the proceeding now before the Court. For that reason upon the very offer of proof, there is no reason whatsoever to put this proceeding over. The Government would urge that any of the evidence that he is attempting to introduce, that should the witnesses be here in court ready to take the stand, that that evidence should be excluded as irrelevant.

For example, the first theory under which Mr. Shapiro has stated that he would wish to introduce evidence was

that the inquiry presently being conducted by the Grand Jury is not a legitimate inquiry under the Motor Carriers' Act. For that purpose Mr. Shapiro has stated that he would wish to call the United States Attorney for the Southern District of New York, Paul W. Williams; that he would wish to procure all, and I emphasize the word "all", of all of the Grand Jury minutes in the investigation before this Grand Jury; that he would wish to subpoena persons and offer evidence of representatives of Interstate [fol. 13] Commerce Commission and the Department of Justice.

Now as to all those items of proof the law is quite clear that even after an indictment has been voted by a Grand Jury, it is not open to the defendant to look to the motive behind the Grand Jury investigation. The cases are legion in support of that proposition.

In this case it is quite clear and will be demonstrated by the Government from the very questions that were put to this witness, and which he has declined to answer, that the investigation is clearly and properly and indisputably within the statutory provisions of the Motor Carriers' part of the Interstate Commission Act.

There is no relevancy to his offer of proof and it could not very well show anything that would affect the proceeding in any way.

As to the request for the charge of the Court to this Grand Jury and the interrogation of the prospective Grand Jurors, I believe that that is a matter of which this Court may take judicial notice, and your Honor having personally charged the jury, this Court is personally aware, having been personally present.

This is the April, 1957 regular Grand Jury. I assume that the charge to the Grand Jury was in the normal form, and the Grand Jury, it is clearly established, has the power and authority to look into any alleged violation of the Federal criminal laws.

Counsel has further adverted to the question of whether the immunity to be granted to this witness upon his testimony is co-extensive with the privilege against self-incrimination, and for that he desires an inspection of

the Grand Jury minutes of all of the other Grand Juries before which this witness may have testified.

[fol. 14] Now all of these requests clearly are an attempt, first, to delay this proceeding, without basis, and, second, to turn the appearance of a mere witness before a Grand Jury into a fishing expedition, not only of all of the information which the Government might have in its possession, but as to all testimony had before this Grand Jury, and the testimony before all other Grand Juries of the testimony of this witness. Clearly a witness before a Grand Jury cannot by the mere refusing to answer a few questions thereby obtain access to confidential Grand Jury information and complete records of the Grand Jury investigation, and for these reasons it is the Government's position that the offer of proof made by counsel for the witness, Mr. Levine, has not raised any relevant line of inquiry.

If Mr. Levine wishes to present any witnesses he may make a further offer of proof, and the Government feels that he would be within his right on this hearing, but there has not been any relevant offer of proof made in the Government's opinion, and therefore there is no reason for an adjournment and no reason for the issuance of any subpoenas as requested by counsel.

Mr. Shapiro: I would like to respond to the points made by Mr. Wachtell.

The Court: You may.

Mr. Shapiro: We are not here arguing about the motive of the Grand Jury. If the immunity statute is applicable, the purposes of the investigation are a material issue in the case. We are trying to determine by the objective tests of what we are looking into with respect to other witnesses in this investigation.

I do not want all of the Grand Jury minutes. I do not think that Mr. Wachtell really believes that I wanted the minutes of every witness that was before this Grand [fol. 15] Jury in any matter. I want and ask the Court to examine the minutes of the Grand Jury pertaining to any other witnesses that may have been called pertaining to this particular investigation to determine whether that

investigation has the genuine purposes of an investigation under the Motor Carriers' Act.

Now Mr. Wachtell says that Mr. Levine has had since March 25th, that I have been up in the Court of Appeals with Mr. Brown and I have been here with Mr. Brown, why aren't your subpoenas out now? How could I get subpoenas before today? We have had no case here, no proceeding before today. Could I go to the District Court Clerk and say that I want to have subpoenas in a case which is not yet pending? There is no jurisdiction to issue them. How would I caption them? How could I describe them so the Clerk could put his seal on them and sign them? I had no opportunities to get subpoenas until now because there is no case until now when the Grand Jury comes down and says, "Your Honor, this is Mr. Levine. He won't answer certain questions, make him answer."

Now is the time when I have to get subpoenas, not three weeks ago. I had a casual conversation with Mr. Wachtell and Mr. Miller in their office. There is no case until now. That is the point on that. This is the time that I am entitled to subpoenas. What good is it for me, what good is the constitutional right to subpoena in compulsory process to Mr. Levine, if he cannot have them for this hearing, which is the only hearing that he is going to have, according to Mr. Wachtell? Why can't I have my subpoenas? You can rule on the evidence when I offer it, but you cannot prevent me, I suggest, your Honor, from getting them. The admissibility is not determined [fol. 16] now. It is determined when I offer it. That is the point. This man is entitled to make a defense at the only hearing that he is going to get.

The Court: I am going to dispose of it in this way. I do not believe that the proposed evidence is relevant or material or proper here. It is my humble opinion that no witness, assuming the questions to be within the scope of the proposed examination has the right to collaterally attack the purposes, motives, or the intent of this Grand Jury or the United States Attorney in the investigation of proper matters in the scope of the law enforcement under Federal jurisdiction.

As long as the questions propounded to this witness relate to those issues, it is my opinion that any effort to delve into the motives, purposes, or intent, as I stated, is entirely improper.

I do not believe that the minutes of the Grand Jury should be revealed. I see no reason for the waiver of the usual rule. There would be no value here on these issues of the testimony of the United States Attorney or any of the other proposed witnesses, or to the charge of the Court to this Grand Jury or to the interrogation of the jurors.

Unless, therefore, there were other proposed witnesses and unless there is other proposed evidence, I must deny the motion for any adjournment, and I so do.

Mr. Shapiro: The other witnesses that I adverted to are on the issue whether the questions are incriminatory and seek to produce evidence here—

The Court: I cannot tell that until I hear the questions. If I believe that during the questions that you are entitled to witnesses, you may be certain that I will allow you an opportunity to secure such witnesses.

[fol. 17] Mr. Shapiro: If your Honor please, I respectfully except to your Honor's ruling on all my motions and applications, and in order that I may be able properly to represent Mr. Levine on this hearing, I respectfully request that the Court direct the United States Attorney to have the United States Attorney's stenographer furnish me with a transcript of the Grand Jury proceedings which were had this morning, so that I may be able to prepare.

Mr. Wachtell: That is the Government's next step. I proposed to offer the proof and to have the entire Grand Jury proceedings read into the record. It is not particularly long.

The Court: I do not think it necessary to submit a copy to counsel. You may proceed.

Mr. Shapiro: I respectfully except.

IDA F. GOLD, called as a witness on behalf of the Government, having been duly sworn, testified as follows:

Direct examination.

By Mr. Wachtell:

Q. Will you state your full name, please?
A. Ida F. Gold.
Q. Are you a Grand Jury reporter duly sworn and authorized to take the testimony of Grand Juries in the Southern District of New York?
A. I am.
Q. Acting in that capacity, did you take a portion of the testimony of the witness, Morry Levine, before the April, 1957 Grand Jury this morning?
A. Yes, sir.
Q. Do you have your stenographic notes of that testimony with you?
A. I do.
[fol. 18] Q. And do they, to the best of your ability, reflect a true and accurate record of what was said?
A. Yes.
Q. Will you read them, please?
A. (Reading):

"By Mr. Wachtell:

"Q. Will you state your full name and address, sir, for the record.
"A. Morry Levine, 3388 Wayne Avenue, Bronx, New York; M-o-r-r-y L-e-v-i-n-e.
"Q. Mr. Levine, have you come here today with your attorney?
"A. I have.
"Q. What is your attorney's name?
"A. Myron Shapiro.
"Q. Is Mr. Shapiro in the anteroom, outside of this Grand Jury?
"A. He is.
"Q. I will advise you, sir, and I feel that the Foreman will concur, that should the occasion arise where you would

wish to consult with your attorney, and if a reasonable request is made, that this Grand Jury will undoubtedly grant your request. Do you understand that?

"A. I do.

"Q. Mr. Levine, have you received a Grand Jury subpoena calling for your appearance before this Grand Jury?

"A. I have.

"Q. Do you have the subpoena card of that Grand Jury subpoena with you.

"A. I do not. Wait a minute—no, I don't."

I was relieved by another stenographer.

Mr. Wachtell: No further questions, your Honor. Are there questions by the witnesses' counsel?

The Court: Do you want to question this witness?

Mr. Shapiro: No, your Honor.

(Witness excused.)

The Court: Next witness.

Mr. Wachtell: The Government calls Miss Emily Cordes.

[fol. 19] Emily Cordes, called as a witness in behalf of the Government, having been duly sworn, testified as follows:

Direct examination.

By Mr. Wachtell:

Q. Miss Cordes, are you a Grand Jury reporter duly sworn and authorized to take testimony of witnesses before the Grand Jury sitting in the Southern District of New York?

A. I am.

Q. Were you acting in that capacity this morning for the April, 1957 regular Grand Jury with the witness, Morry Levine?

A. Yes, I was.

Q. Do you have your stenotype notes of that testimony with you?

A. Yes.

Q. Do those notes, to the best of your ability, represent a true and accurate copy of the testimony?

A. Yes.
Q. Will you read that to the Court?
A. (Reading):

"Q. Now, I show you a Grand Jury subpoena original dated March 26, 1957, and ask you if you've ever seen this subpoena before.
"A. My recollection was that it was a card. Is that a reprint of this subpoena?
"Q. You say you received a card, is that correct?
"A. That is right.
"Q. Were you shown the original subpoena at that time, do you recall?
"A. I don't recall that.

"Mr. Wachtell: May the record reflect that the original Grand Jury subpoena that I have is addressed to Morry Levine, care of Young Tempo, Inc., 1375 Broadway, New York, New York, that it is dated March 26, 1957, that it is returnable April 3rd, 1957, at 10:00 A.M., and that it calls for Mr. Levine 'to testify and give evidence in regard to an alleged violation of Sections 309 and 322 of Title 49, U.S.C.' May the record further indicate that the [fol. 20] return of the United States marshal on this subpoena indicates that it was personally served upon Mr. Morry Levine on March 27, 1957, at 1375 Broadway. May the record further indicate that the adjournment of this subpoena from April 3rd, 1957, was agreed upon between Mr. Shapiro, counsel for Mr. Levine, and myself, and that Mr. Levine is presently before the Grand Jury in response to a letter of the United States Attorney, calling for his appearance today, April 18, 1957, at 10:30 A.M.

"Q. Is that correct, Mr. Levine?
"A. It's correct.
"Q. Mr. Levine, are you associated with Young Tempo, Inc.?
"A. May I consult with my attorney on that question, please?

"Mr. Wachtell: I would suggest it to the Foreman.
"Foreman: Yes, you may.

"(Witness leaves room, then returns.)

"Q. Mr. Levine, you understand, of course, that you're still under oath.

"A. I do.

"Q. Have you consulted with your attorney?

"A. I have.

"Mr. Wachtell: May we have the question read, please.

"(Question read back as follows: 'Mr. Levine, are you associated with Young Tempo, Inc.?')

"The Witness: I must refuse to answer that question on the grounds that it may tend to incriminate me.

"Q. Mr. Levine, I will advise you at this time that this Grand Jury is conducting an investigation into possible [fol. 21] violations of the Interstate Commerce Laws of the United States, and, more specifically, the sections of the United States Code that were specified on the subpoena served upon you which I have previously read into the record here. I will further advise you, sir, that in Title 49, United States Code, Section 305(d), the Congress of the United States has provided that any witness who is compelled to give testimony as to any matter arising under the Motor Carrier Part of the Interstate Commerce laws—and that includes the sections under which this Grand Jury investigation is being conducted—that any such witness shall, by virtue of his testimony, be given full and complete immunity from any prosecution as to any criminal offense which might arise out of the subject matter of his testimony. That grant of immunity provided by Congress is as broad as the constitutional privilege and protection that you would otherwise have under the Fifth Amendment to the United States Constitution. Consequently, as by your testimony here you will receive such a full grant of immunity, I will advise you that you do not have any privilege to plead the Fifth Amendment before this Grand Jury in this inquiry. Now, this is a matter which, as I am sure you know, has previously been the subject of much discussion between your attorney, Mr. Shapiro, and the United States Attorney's Office. As you likewise know, I am sure, it has previously been before the United States District Court here last week in connec-

tion with the appearance of your partner, Mr. Emanuel Brown. Now, in view of the fact that you do not, by virtue of this immunity statute, have any privilege to claim before this Grand Jury, I will now ask that the Foreman direct you to answer that question.

[fol. 22] "Foreman: As Foreman of this Grand Jury, I direct you to answer the question put to you by the Attorney.

"Witness: I must respectfully decline, sir, on the grounds that it may tend to incriminate me, sir.

"Q. Have you understood the statement I made, that even if the answer to that question might tend to incriminate you, you are not entitled to plead the Fifth Amendment because of the fact that you would receive immunity by virtue of your testimony? Do you understand my statement?

"A. Mr. Wachtell, I do understand your statement.

"Q. Do you wish to consult with your attorney again, in view of the fact that the Grand Jury Foreman has directed you to answer that question?

"A. I would like to avail myself of that.

"Foreman: You are excused.

"Witness: Thank you.

"(Witness leaves the room, then returns.)

"Q. Now, Mr. Levine, you are, of course, still under oath. Have you consulted with your attorney?

"A. I have, Mr. Wachtell.

"Mr. Wachtell: Once again, may we have the question read, if you please.

"(Question read back: 'Mr. Levine, are you associated with Young Tempo, Inc.?')

"Witness: Mr. Wachtell, I have talked with my attorney, who's in the anteroom, upon your direction, and he told me that there are substantial questions of law involved in this matter that we've discussed. He has told me that in a similar case, that of Emanuel Brown, which is before

[fol. 23] the Court of Appeals and has granted Mr. Brown bail, that the question of whether there is immunity is not clear and not definite in his mind or in my mind.

"Q. Are you, therefore,—

"A. And, therefore, I must respectfully decline to answer the question on the grounds that it may tend to incriminate me.

"Q. This is despite the direction of the Grand Jury Foreman that you answer the question?

"A. I have respectfully declined for the reason I gave, that it may tend to incriminate me, sir.

"Q. Mr. Levine, does Young Tempo, Inc., use a trucking company known as the T. & R. Cutting Company or the T. & R. Trucking Company?

"A. I must refuse to answer that question on the grounds that it may tend to incriminate me, sir.

"Mr. Wachtell: Mr. Foreman, for the same reasons that I have previously set forth, I will ask that the witness be directed to answer the question.

"Foreman: As Foreman of this Grand Jury, I again direct you to answer the question put to you by the Attorney.

"Witness: I must respectfully decline, sir, on the grounds that it may tend to incriminate me.

"Q. Mr. Levine, who do you know to be the owner or owners or the principal in interest or principals in interest of the T. & R. Cutting or the T. & R. Trucking Company?

"A. Mr. Wachtell, I must decline to answer that question on the grounds that it may tend to incriminate me.

"Mr. Wachtell: Mr. Foreman, again may the witness be directed to answer.

[fol. 24] "Foreman: As Foreman of this Grand Jury, I direct you to answer the question put to you by the Attorney.

"Witness: Again I respectfully decline, sir, on the grounds that it may tend to incriminate me.

"Q. Mr. Levine, are you associated with the Acme Dress Company in Midvale, New Jersey?

"A. Mr. Wachtell, I refuse to answer that question on the ground that it may tend to incriminate me.

"Mr. Wachtell: May we have a direction, Mr. Foreman?

"Foreman: As Foreman of this Grand Jury, I direct you to answer the question put to you by the Attorney.

"Witness: And I decline that question on the grounds that it may tend to incriminate me.

"Q. Mr. Levine, does the T. & R. Trucking Company provide trucking services between Young Tempo, Inc., in New York City and the the Acme Dress Company in Midvale, New Jersey?

"A. I refuse to answer that question on the grounds that it may tend to incriminate me.

"Mr. Wachtell: Mr. Foreman, may we have a direction, if you please.

"Foreman: As Foreman of this Grand Jury, I direct you to answer the question put to you by the Attorney.

"Witness: I refuse to answer that, sir, with due respect to you, on the grounds that it may tend to incriminate me.

"Q. Mr. Levine, do you know if the T. & R. Trucking Company or the T. & R. Cutting Company has applied [fol. 25] for or obtained a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, New York, and Midvale, New Jersey?

"A. I refuse to answer that on the grounds that it may tend to incriminate me.

"Mr. Wachtell: Mr. Foreman.

"Foreman: As Foreman of this Grand Jury, I direct you to answer the question put to you by the Attorney.

"Witness: I refuse to answer that, sir, on the grounds that it may tend to incriminate me.

"Mr. Wachtell: Mr. Foreman, may we have the witness excused temporarily, with direction to remain outside of the Grand Jury room for further directions.

"Foreman: Would you please be excused as Mr. Wachtell directs.

"Witness: Yes, sir.

"(Witness excused.)

"(Grand Jury adjourned to Court room 318.)"

Mr. Wachtell: I have no further questions of this witness, if your Honor please.

The Court: Any cross-examination?

Mr. Shapiro: No cross.

(Witness excused.)

Mr. Shapiro: May it be stipulated that the witness here appeared pursuant to subpoena?

Mr. Wachtell: Yes.

Mr. Shapiro: And that his appearance was compelled and not voluntary?

Mr. Wachtell: Yes. There was an agreement between counsel that the appearance would be adjourned until con-
[fol. 26] venient. The Government then sent a letter to Mr. Shapiro with a copy to Mr. Levine requiring his appearance, and the Government will agree that the appearance was compelled pursuant to the subpoena.

The Court: Anything further from you?

Mr. Wachtell: The Government rests.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Anything further?

Mr. Shapiro: If your Honor please, I renew the motions and applications that I made before?

The Court: On the same grounds?

Mr. Shapiro: On the same grounds also I call your attention, your Honor, to the necessity at this point for me to have an opportunity to present evidence on the question of whether the questions, on the issue, whether the questions are incriminatory. I respectfully request an adjournment for that purpose.

Would your Honor like before to go into the question of whether the immunity applies at this point, or do you want to deal with the question of my motions and applications? I would also like—

The Court: What do you propose to prove?

Mr. Wachtell: The Government will concede on the basis of the witness' continuing representation to the Grand Jury, the Government will concede that the answers to these questions might tend to incriminate him.

The Court: Then it is unnecessary to produce proof of that.

Mr. Shapiro: Well, on the other issues in the case, if your Honor please—

The Court: Those are, I take it, purely issues of law as to whether the immunity is as broad as the testimony. [fol. 27] Mr. Shapiro: I am talking about the motions and applications which I made before with respect to the issues of the genuineness of this investigation.

The Court: I adhere—all right, finish your statement.

Mr. Shapiro: —the genuineness of this investigation and also whether the immunity is co-extensive with the privilege which this man has under the Constitution not to give incriminatory testimony.

I would also like to make my objection again to this whole procedure on the ground that it deprives Mr. Levine of his rights under the Constitution and under Rule 42(b) of the Federal Rules of Criminal Procedure.

The Court: As to that, I do not believe that it falls within that rule.

As to the procedure, I believe that has been in effect proved. As to the application with respect to the production of certain witnesses specified by you, I am sure that the testimony and documents, and so forth, as referred to by you,—I do not believe that those are proper or necessary or relate to the issues.

I therefore deny the application.

Mr. Shapiro: I ask the Court to direct the United States Attorney to produce the manual or instruction sheet of the Department of Justice pertaining to investigations under the Motor Carriers' Act if there is one.

Mr. Wachtell: Your Honor, I will be frank and state that I do not know if there is one. In any case, however, I will only reiterate that the United States Attorney is an arm of the Government and the legal adviser to the Grand Jury. It is authorized and empowered to investigate all violations of the Federal Criminal Law. There are cases

stating that, as to anything internal, the Department of Justice regulations that might as a matter of internal Gov-
[fol. 28] ernment policy limit such power or make such power contingent upon prior approval of superior persons in the Department of Justice are on merely matters of internal policy that cannot inure to the benefit of the defendant.

I am not stating that there are any such limitations in the present case, and I am quite sure that these are not, but even should there be, that is not a matter which a witness before the Grand Jury can raise in the court.

The Court: I do not believe that that is pertinent to this inquiry or to the testimony of this witness. I refuse to ask the Government to seek and obtain such manual, if there is any such manual.

Mr. Shapiro: It is pertinent in this sense, your Honor: I am entitled to show the administrative construction of Section 305-d by the Interstate Commerce Commission and by the Department of Justice over the years since its enactment in respect to criminal investigations and with respect to the question of immunity. I am entitled to these papers, if they exist, if there is any such statement, in order that I may offer whatever evidence is available as to the administrative construction of this Section which is before your Honor today.

Mr. Wachtell: Counsel is in fact asking the Government to do the legal research for him.

Mr. Shapiro: If it is a document which is in the private files of the United States Attorney or the Department of Justice, and it is not possible for me to find it in the library. I assure the United States Attorney if it were available in any library I would find it. But I do not have any access to the Department files.

The Court: I will deny the application.

Mr. Shapiro: If your Honor please, I respectfully except.

[fol. 29] Would your Honor want to hear me on the substantive question involved, on the question of the applicability or the immunity section, if any?

The Court: Yes. Of course, you have gone into this rather thoroughly in the Emanuel Brown matter.

Mr. Shapiro: I have done it a little more thoroughly since then, your Honor.

The Court: I will be happy to listen.

Mr. Shapiro: My thinking on the question of the applicability of the statute is reenforced more and more because of the opportunity I had to look further into the situation.

Your Honor will recall that Section 305(d) of the Motor Carriers' Act is an Act which gives the Interstate Commerce Commission certain powers of investigation, subpoena, and so forth, and provides with respect to immunity of witnesses appearing in an investigation of any manner under this Chapter shall be entitled to the same immunity as a witness under Section 46.

First, when I advance the argument that this Section by its language did not incorporate the Section 46 to the extent that it would apply to Grand Jurors, I thought that this was a novel question, but research has disclosed, your Honor, that there are a number of statutes on the books enacted by Congress in which the Grand Jury was not given any power with respect to immunity, and the immunity provisions are restricted to Commissions or administrative officers.

For example, you have the Federal Trade Commission Act which was enacted in 1914, the Taft-Hartley Act. The Federal Trade Commission Act is 49 U.S.C.A., Chapter 2.

The Taft-Hartley Act is 29 U.S.C.A., Section 161, sub. 3.

The Court: What is the Federal Trade Commission?

Mr. Shapiro: 49 U.S.C.A., and the Taft-Hartley Act is 29 U.S.C.A., Section 161, sub. 3.

[fol. 30] The Merchant Marine Act of 1936, 46 U.S.C.A., Section 1124(c).

The Perishable Commodities Act, 7 U.S.C.A., Section 499(m), sub. F.

Section 15 U.S.C.A., Section 155, which is the China Trade Act—

The Court: 15 what?

Mr. Shapiro: U.S.C.A., Section 155, which is the China Trade Corporation Act.

42 U.S.C.A., Section 405, which is a Social Security Act.

42 U.S.C.A., Section 2201, which is the Atomic Energy Act.

50 appendix U.S.C.A., Section 1896, which is the Rent Control Act.

Then you have other statutes dealing with immunity such as the Securities Act of 1933, which does not limit the immunity to proceedings before the Commission but extends it to "any cause or proceeding instituted by the Commission."

I gather from these sections, your Honor, that this is not something new; that Congress does not always give and extend the immunity statute, at least since 1914, to the Grand Jury proceedings; that in many cases it has restricted it to the Commission, so that that leads me at least to the conclusion that whatever section dealing with immunity must be carefully studied to determine whether it actually does extend the immunity to Grand Jury proceedings.

Now in this situation, re-reading Section 305(d), if we bear in mind that the punctuation marks are no part of the Act, and that to determine the intent of the law, this Court in construing the statute must disregard the punctuation, then we must take the whole of subdivision (d) of Sec- [fol. 31] tion 305 and read it together. And when we read it together, I respectfully submit, the conclusion is quite clear that the immunity attempted to be given there is restricted to investigations by and before the Commission and do not extend to Grand Jury proceedings.

Consequently, the offer of immunity by the United States Attorney in these minutes here today would prove an illusion and a snare to the witness, because at a later time he might be indicted on these matters because the Government might argue that he did not have immunity under the statute. The Government is not estopped. There is no estoppel against the Government here. We are in a position where we must rest upon his constitutional privilege to protect himself, otherwise he may endanger himself.

There are other points which I do want to urge upon you. If you will recall, Section 305(d) commences with the language: "So far as may be necessary for the purposes of this chapter."

Now I urge upon your Honor that that is a limitation upon the whole Section 305(d), and since it is such a limi-

tation, it limits the immunity and prevents it from being co-extensive with the Constitutional privilege to which Mr. Levine is entitled.

It is very easy to suppose, and quite probable, that it could be argued at a later time, that if the Government asked questions beyond the scope of the questions today, that the Government could then argue that they can use the incriminatory evidence and that they could indict Mr. Levine and prosecute him for the reason that only these questions which were asked of him are necessary for the purposes of this Chapter, and consequently the rest of it was not within the immunity statute.

The Court: Do you contend that any of these questions do not relate to the purposes of this Chapter?

[fol. 32] Mr. Shapiro: Some of them may not, your Honor.

The Court: I am not asking you—

Mr. Shapiro: I do not have a transcript in front of me. I cannot remember these six questions.

Mr. Wachtell: If I may interrupt, your Honor, the six questions here are identical, word for word, to the six questions that were put to Mr. Brown and form the basis of the former proceeding, so that I believe counsel does have those six questions before him.

Mr. Shapiro: That part is not relevant to this argument, your Honor.

The Court: If you don't press it, it isn't.

Mr. Shapiro: I am pressing the argument. I tell you why: The test of the immunity statute is not these questions, but whether it is co-extensive with the entire privilege as to any question.

The Court: At the threshold it is tested by those questions. If those questions do not exceed the purposes of the Chapter, and the Chapter has given the protection, then he is protected. I am not going to get into speculative questions which go beyond those which have already been asked. The only thing before this Court at this time are these six questions.

Mr. Shapiro: I respectfully disagree with your Honor.

I raise also at this time again the question of the other Grand Jury proceedings in which this witness was a

participant and in which he was told by the United States Attorney, Mr. Wachtell, that he will be indicted, that he is a defendant.

And I say therefore to your Honor that the immunity here necessarily cannot be co-extensive with the privilege which this man has because of that reason. And I therefore state to your Honor that the witness Levine has [fol. 33] properly claimed his privilege. It is conceded that the questions are incriminatory. And I contend, your Honor, I believe, correctly, that the immunity does not extend and does not cover the Grand Jury proceedings, therefore he should not be required to answer these questions.

Mr. Wachtell: If I may respond briefly, your Honor, the Government's position on this has been made quite clear in prior arguments in this Court in the matter of Emanuel Brown, as well as in the papers and arguments before the Court of Appeals.

Section 305(d), Title 49, unambiguously states that the witness shall have the same immunity as if the matter rose under Chapter 1 of Title 49. Chapter 1, namely, Section 46, Title 49, gives a complete and full constitutional grant of immunity, and quite explicitly as has been construed by the Courts, includes a Grand Jury proceeding.

The language of Section 305(d) is likewise quite broad and speaks of "any proceeding." It is not limited to "any proceeding before the Commission."

The statutes which Mr. Shapiro has cited as being limited to various forms of Commissions, quite specifically by their terms are so limited. For example, Mr. Shapiro has referred to the Federal Trade Commission Act. The language used there is "No person shall be excused from attending, testifying or producing documentary evidence before the Commission or in obedience to the subpoena of the Commission."

The Taft-Hartley Act, cited by Mr. Shapiro, says "No person shall be excused from attending and testifying or from producing books, records, correspondence, documents or other evidence in obedience to the subpoena of the Board."

[fol. 34] The Merchant Marine Act, which has been cited, says "No person shall be excused from attending and testifying or from producing books, papers or other documents before the Commission, or any members or officer or employee thereof," and then goes on.

It is quite clear that that is not the language of this statute and that this statute speaks of "any proceeding" under the Act. Counsel, in effect, is arguing that should a witness have relied on the clear and unambiguous language of the Motor Carriers' Act and have come before a Grand Jury, believing that he is going to get immunity, and have testified fully, that some day someone could turn around and say to him, "No, by some vague theory, the immunity that he thought he was getting he was not getting; although Section 305(d) says "Any proceeding" actually it does not mean what it says and does not enable him to get immunity before the Grand Jury, although he thought he was getting immunity.

That is the argument that was rejected by the Court of Appeals in the Monia case where under a similar question whether the privilege had to be claimed, the Supreme Court, quite clearly said that you have to abide by the Congressional language. If there is different language in the immunity statutes, you reach a different result.

Mr. Shapiro's further argument as to Congressional intent since 1914 not to provide immunity in Grand Jury proceedings is quite erroneous, and we can refer to the language of the Interstate Commerce Act to prove it; because under the Freight Forwarders' part and also the Water Carriers' part which fully incorporate Section 46, and both of which were enacted in much more recent times, approximately 1940, there can be no dispute but that Grand Juries were included in the immunity provisions.

[fol. 35] Congress has by its language in the Interstate Commerce Act quite clearly expressed the desire that all four parts of the Act included in the Motor Carriers' Act should be construed in pari materia, there is no reason to distinguish the motor carriers part from the others, and there is no reason for not thinking that under the clear language of the Act that the immunity provides for a Grand Jury proceeding.

The Court: Very well. Now under the circumstances and upon all the facts and upon all the record, and for the reason which I set forth at the time of the disposition of a similar matter, in the matter of the witness Emanuel Brown, I am forced to conclude that the immunity is there, that the witness must answer, and I therefore direct him to answer the questions which were set forth by the witnesses from the Grand Jury who testified today.

Mr. Shapiro: May I have a clarification, your Honor?

The Court: I direct the witness to answer the questions.

Mr. Shapiro: I understand that. Are you directing him to answer these specific questions?

The Court: These questions and any other pertinent questions, but I am directing him specifically to answer these questions.

Mr. Shapiro: I respectfully except to your Honor's ruling.

The Court: Very well. The Grand Jury, I assume, will retire then.

Mr. Wachtell: Yes, your Honor. I do not know the Court's convenience. I was going to suggest that some time could be saved if the Grand Jury would reconvene in the same court room and if it were clear of all persons except the Grand Jury personnel.

[fol. 36] The Court: All right.

Mr. Shapiro: If your Honor please, may I have an adjournment in order to consult with my client? May we approach the bench, your Honor?

The Court: Yes.

(Discussion at the bench between Court and counsel, off the record.)

The Court: The Grand Jury will recess until Monday at 10:30.

The witness will be available at the same place at 11:30.

Mr. Wachtell: Thank you, your Honor.

The Court: On Monday morning.

(Whereupon, an adjournment was taken to Monday, April 22, 1957, at 10:30 a.m.)

IN THE UNITED STATES DISTRICT COURT

Proceedings of April 22, 1957

APPEARANCES:

Paul W. Williams, Esq., and H ert M. Wachtell, Esq., for the Government; Myron L hapiro, Esq., for the Witness.

TRIAL CON UED

COLLOQUY BETWEEN C URT AND COUNSEL

The Court: Will those who have no other business in the courtroom please leave now? I have a Grand Jury proceeding.

[fol. 37] The Clerk: The Marshal will clear the court room.

(Court room cleared by the Marshals.)

The Court: Off the record.

(Discussion off the record.)

Mr. Wachtell: If your Honor please, the April, 1957 regular Grand Jury once again requests the assistance of the Court in regard to the witness Morry Levine, who has again appeared before that Grand Jury this morning in pursuance to the direction of the Court issued last Thursday, April 18th. If your Honor please, the Government at this time would wish to call Mrs. Margaret Connolly, the Grand Jury Reporter, to inform the Court as to what transpired in the Grand Jury room this morning.

The Court: Yes.

Mr. Shapiro: If your Honor please, I would request that the procedure that we have now follow the requirements of Rule 42(d) of the Federal Rules of Criminal Procedure and the requirements of due process.

I believe that I should call to your Honor's attention the case of Carlson vs. United States, which has previously been cited by the Government in these proceedings and point out that the Court of Appeals in the First Circuit, in discussing this very question, said that when this situation arises it must be prosecuted in accordance with

Rule 42(b) and the witness is entitled to notice of the facts constituting the criminal contempt, and he is entitled to frame his defense and put in his evidence directed to that issue.

Now the Government in citing the Carlson case only, of course, reads one part of it, but the balance of the opinion is very clear on this fact, which says:

"If the witness, instead of disobeying the Court's order in the actual presence of the Judge, proceeds back [fol. 38] to the Grand Jury room and there again refuses to answer the question which the Court directed him to answer, this is still disobedience of a lawful order of the Court within the meaning of 18 U.S.C. Section 401(3). But because such disobedience did not take place in the actual presence of the Court, and thus could be made known to the Court only by the taking of evidence, the Court would have to conduct the proceeding in criminal contempt in accordance with Rule 42(b).

"It is important that the Grand Jury witness accurately be put on notice of the nature of the proceeding. If it is nothing more than a request by the Grand Jury for a ruling by the Court on the availability of the privilege, then the witness should be informed that he is not being cited to answer a charge of a completed contempt of Court, and he will know that the only issue to which he shall have to address himself, at the hearing before the Court, is whether he was entitled to decline to answer the particular questions on the ground of his privilege against self-incrimination. The worst that could happen, if the ruling is against him, is that he would be given a second chance to go before the Grand Jury and answer the questions. If, on the other hand, he is being charged with misconduct in the jury room constituting misbehavior in the presence of the Court, this charge must be prosecuted on notice, and under Rule 42(b) the notice 'shall state the essential facts constituting the criminal contempt charged and describe it as such.' If the alleged misbehavior is a sneering, insolent, disrespectful attitude manifested by the witness in the jury room, then the requisite notice must set forth the essential facts constituting such misbehavior so that the

witness may frame his defense, and put in his defense directed to that issue. If the charge of misbehavior is that [fol. 39] the witness deliberately obstructed the Grand Jury proceedings by flatly refusing to answer questions, without any pretended excuse, the notice should specifically so state. If the charge of criminal contempt is that the witness declined to answer the questions upon the pretended ground that the answers would tend to incriminate him, this claim of privilege being advanced to bad faith, then (assuming that such conduct might be deemed misbehavior in the presence of the Court within the meaning of 18 U.S.C. Section 401(1) the required notice under Rule 42(b) would have to describe the alleged misbehavior in order that the witness, in preparing his defense to the charge, may direct his evidence to the issue of his good faith in claiming the privilege."

I think that the procedure outlined in the Carlson case is that which is required by due process and that which is required by Rule 42. I therefore respectfully request the Court to direct the United States Attorney to comply with Rule 42(b) and afford us notice of the charges, and opportunity to prepare and an opportunity to frame our defense to the charges.

Mr. Wachtell: If your Honor please, as counsel is aware, both from the prior proceeding and in this matter, as well as the proceedings that were had in the matter of the witness Emanuel Brown, whom counsel likewise represented, although there is no doubt in the Government's mind that this witness, Mr. Levine, has already been guilty of a consummated contempt in his refusal this morning—as will be brought out—to answer the questions that he had been previously directed to answer, the Government is not at this time requesting the Court to punish him for that contempt. The Government is instead giving the witness still another chance and is giving him even more pro- [fol. 40] tection than that outlined in the Carlson case, in that the Government is again bringing the witness before this Court, not to be punished for contempt, but again that he be directed to answer questions and then, and only then, if he refuses here and now in the physical presence of this

Court, he refuses to answer the questions that the Court shall direct him to answer, that he then be punished for contempt under Rule 42(a) of the Federal Rules of Criminal Procedure, and that procedure is specifically delineated and approved in the very Carlson case from which Mr. Shapiro has been reading from.

I will not take the time of the Court to read excerpts which establish that, at page 216 of 209 F. 2d.

The Court: Proceed.

Mr. Shapiro: If your Honor please, is your Honor overruling my application?

The Court: I am.

Mr. Shapiro: At this time I would also request an adjournment so that I may subpoena witnesses and request the issuance of compulsory process, and renew all the motions and applications which I made on Thursday.

The Court: For the same purposes as made on Thursday?

Mr. Shapiro: That is right, your Honor.

The Court: And No. 1 was to attempt to show that the proposed examination was not in accord or not within the confines of the Motor Carriers section? Was that the first one?

Mr. Shapiro: The first application was on the issue of fact in this proceeding, which I understand involves a claimed investigation under the Motor Carriers Act and is to show that this is not really an investigation under the Motor Carriers Act.

[fol. 41] The Court: And at least in answer to a question that I addressed to you, you pointed out no part of any one of the questions at issue which in your judgment was outside the Motor Carriers Act, in effect.

Mr. Shapiro: That is true.

The Court: You will concede that all of the questions are confined within the issues of the Motor Carriers Act.

Mr. Shapiro: I assume that the questions asked Mr. Levine this morning were the same as were asked on Thursday.

The Court: Well, I assume that.

Mr. Wachtell: That is correct.

The Court: Do you contend that any one of them is beyond the confines of the Motor Carriers Act?

Mr. Shapiro: In part, yes, your Honor.

The Court: Which one and which part?

Mr. Shapiro: "Are you associated with Young Tempo, Inc.?" In large part that is not connected with the Motor Carriers Act investigation.

The Court: It certainly lays the groundwork for the subsequent questions.

Mr. Shapiro: It also lays the groundwork for the real purposes of this investigation, your Honor, which is not under the Motor Carriers Act.

The Court: Is that all?

Mr. Shapiro: "Who do you know to be the owner or owners or the principals"—this may be a typographical error, but this is the way it reads in the paper that I have here, "Who do you know to be the owner or owners or the principal in interest or principals in interest of the T and R Cutting or the T and R Trucking Company?"

Then this question:

"Q. Are you associated with the Acme Dress Company in Midvale, New Jersey?"

[fol. 42] Mr. Wachtell, Your Honor, on the morning of the sentence, said, "None the less, as counsel for Mr. Brown has indicated frequently here, the subject matter to some extent and the witness Mr. Brown himself have been before other Grand Juries investigating, as I believe I stated to your Honor, on Friday, the Victor Riesel obstruction of justice case as well as the general racket investigation being conducted for the past year in this district.

"It is the Government's information, as the questions attempted to bring out in this case, that the witness, Mr. Brown, has been associated in certain respects with certain persons who are the subject of these investigations. The present one included information as to an interstate commerce investigation, these persons being John Dioguardi and Theodore Ray, as well as possibly others.

"The information that it is desired to elicit from this witness, I represent to the Court, is of the very greatest

importance, and the witness' refusal to answer is a very great stumbling block to this investigation and to all these investigations."

I believe that this is sufficient basis, your Honor, to enable us or allow us to proceed with proof to establish that the subject matter of this investigation is not primarily under the Interstate Commerce Act and possible violations of provisions of that Act, and that therefore we would like to be served with notice of the charges and an opportunity to prepare our defense against the alleged wrongdoing by Mr. Levine.

The Court: As I ruled Thursday, I must rule now, in so far as the proposed examination is concerned into the motives, intent, plans, and so forth, of the United States Attorney I do not believe that this scope or this field of investigation is proper. I do not believe that the intent [fol. 43] or motive of the United States Attorney here is subject to examination; I must assume that his office intends to comply with the law and to enforce the law. And I know of no reason nor authority for investigating the motives and going into any such investigation as that.

I therefore decline in so far as the questions are concerned which are here today and which were concerned before on Thursday, and I rule that they are pertinent to the investigation and are within the scope of the Motor Carriers Act, that the immunity is as broad as the questions, and I therefore overrule your objection. You may proceed.

Mr. Shapiro: If your Honor please, I except to your Honor's ruling.

The Court: Yes.

Mr. Shapiro: And I call your Honor's attention to a statement that you made, and I ask you to reconsider it.

The Court: Which is that?

Mr. Shapiro: You said that the immunity is as broad as the questions asked. And I respectfully state to your Honor that the test of the immunity is not whether it is co-extensive, with the question asked is whether it is co-extensive with the privilege of self-incrimination which this witness, Morry Levine, has. If your Honor please, that would bring me to the second issue of fact, and that

is an opportunity to present or to obtain evidence to demonstrate to this Court or to make an attempt anyway to demonstrate to this Court that the immunity purported to be granted here is not co-extensive with Mr. Levine's privilege against self-incrimination.

The Court: I believe it is.

Mr. Shapiro: I respectfully except.

Mr. Wachtell: The Government would call Miss Margaret Connolly, if your Honor please.

[fol. 44] MARGARET D. CONNOLLY, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Wachtell:

Q. Mrs. Connolly, are you a Grand Jury Reporter duly sworn and authorized to record proceedings had before the Grand Jury in the Southern District of New York?

A. Yes.

Q. Acting in that capacity, did you make stenographic notes of the testimony of the witness Morry Levine before the April, 1957 regular Grand Jury this morning?

A. Yes.

Q. Do you have those notes with you?

A. Yes.

Q. And do they represent to the best of your ability an accurate transcript of what transpired before the Grand Jury?

A. They do.

Q. Will you read them for the benefit of the Court?

A. (Reading):

"MORRY LEVINE, called as a witness, and having been duly sworn by the Foreman of the Grand Jury, testified as follows:

"By Mr. Wachtell:

"Q. Will you state your full name, please?

"A. Morry Levine, M-o-r-r-y.

"Q. Mr. Levine, is your attorney Myron Shapiro with you today in the anteroom outside of this Grand Jury?

"A. Yes, sir.

"Q. Have you had the opportunity to consult with your attorney, Mr. Shapiro, since leaving the court room last Thursday, April 18th?

"A. For a short while; he had to go away.

"Q. You have consulted with him?

"A. For a while, yes, sir.

[fol. 45] "Q. I am going to put to you the six questions that you have previously declined to answer before this Grand Jury and that you have been directed to answer by Judge Levet of this Court. Mr. Levine, are you associated with Young Tempo, Incorporated?

"A. Mr. Wachtell, I'm declining to answer that question on the grounds that it may tend to incriminate me.

"Q. Mr. Levine, do you understand that you have been directed by a Judge of this Court to answer that question notwithstanding the fact that an answer may tend to incriminate you?

"A. I understand that, sir.

"Q. Mr. Levine, does Young Tempo, Incorporated, use a trucking company known as the T and R Cutting Company or as the T and R Trucking Company?

"A. I decline to answer that on the grounds that it may tend to incriminate.

"Q. Mr. Levine, who do you know to be the owner or owners or the principal in interest or principals in interest of the T and R Cutting or the T and R Trucking Company?

"A. I must decline to answer that question on the grounds that it may tend to incriminate me.

"Q. Mr. Levine, are you associated with the Acme Dress Company in Midvale, New Jersey?

"A. Again I must decline to answer that question on the grounds that it may incriminate me.

"Q. Mr. Levine, does the T and R Trucking Company provide trucking service between Young Tempo, Incorporated, in New York City and the Acme Dress Company in Midvale, New Jersey?

"A. Again, sir, I must decline to answer that question on the grounds that it may tend to incriminate me.

"Q. Mr. Levine, do you know if the T and R Trucking Company or the T and R Cutting Company has applied [fol. 46] for or obtained a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, New York, and Midvale, New Jersey?

"A. I must refuse to answer that, sir, on the grounds that it may tend to incriminate me.

"Q. Now, again, Mr. Levine, as to each of those six questions, do you understand that you have been directed by a Judge of this Court to answer each and every one of those six questions?

"A. I understand that.

"Q. And despite that direction you are persisting in your refusal to answer those questions, is that correct?

"A. That's correct.

"Mr. Wachtell: Mr. Foreman, may we have the witness excused temporarily with a direction to remain outside of this Grand Jury room for further direction.

"Foreman: Will you wait outside, please.

"Witness excused.)"

The Court: Any cross-examination?

Mr. Shapiro: No, sir, your Honor.

The Court: You are excused.

(Witness excused.)

Mr. Wachtell: At this time, if your Honor pleases, and in accordance with the procedure which has been approved by the Court of Appeals of this Circuit, I would respectfully request that the Court place to the witness here and now the six questions he has previously refused to answer, and if the Court is so minded, to direct the witness to answer each of those questions.

The Court: Yes, will you take the stand.

Mr. Shapiro: I object to this, your Honor.

The Court: Overruled.

[fol. 47] MORRY LEVINE, called as a witness, was examined and testified as follows:

By the Court:

Q. You are still under oath, Mr. Levine, with respect to what is said here, and with respect to any testimony here, do you understand that?

A. Yes.

Mr. Shapiro: If your Honor please, what is this proceeding now? Is this the Grand Jury proceeding, or is this a contempt proceeding?

The Court: The Court and the Grand Jury.

Mr. Shapiro: I respectfully except. I object to any such procedure and I ask that we proceed in accordance with Rule 42(b), not in accordance with Mr. Wachtell's understanding of the practice in this District.

The Court: We are proceeding in accordance with Rule 42(a).

Mr. Shapiro: I respectfully except, your Honor. I also object to the witness being put on the stand in a proceeding in which he is in jeopardy and which involves the possibility of a criminal contempt, and I ask that he not be required to testify in a proceeding in which he is in jeopardy, in violation of his constitutional rights, irrespective of the question of immunity.

Certainly if we are proceeding in accordance with due process and in accordance with 42(b), he could not be compelled to take the stand. I do not know and I have never heard of a proceeding, your Honor, with all due respect in which the Grand Jury meets with the District Court Judge presiding.

[fol. 48] I do not know of any such proceeding. I do not know where it is provided for.

I respectfully again except to this practice and procedure.

The Court: Overruled.

By the Court:

Q. Mr. Levine, I am going to ask you certain questions and I direct you to answer the questions:

"Q. Are you associated with Young Tempo, Incorporated?"

Mr. Shapiro: I object, your Honor.
The Court: Overruled.
Mr. Shapiro: To the direction and the question.

A. Your Honor, I must respectfully decline to answer that question on the ground that it may tend to incriminate me.

Q. You decline to answer?
A. I do, sir.
Q. I ask you a second question:

"Q. Does Young Tempo, Incorporated, use a trucking company known as the T and R Cutting Company or as the T and R Trucking Company?"

I direct you to answer.

Mr. Shapiro: I object to the question and to the direction.
The Court: Overruled.

A. Your Honor, again I respectfully decline to answer the question on the ground that it may tend to incriminate me.

Q. You refuse and decline to answer?
A. Yes, sir.
Q. Third, I ask you another question:

[fol. 49] "Q. Who do you know to be the owner or owners or the principal in interest or principals in interest of the T and R Cutting or the T and R Trucking Company?" I direct you to answer.

Mr. Shapiro: I object to the question and the direction, your Honor.
The Court: Overruled.
Mr. Shapiro: Exception.

A. I must decline to answer that question on the ground that it might tend to incriminate me.

Q. "Q. Mr. Levine, are you associated with the Acme Dress Company in Midvale, New Jersey?" And I direct you to answer.

Mr. Shapiro: I object to the question and to the direction, your Honor.

The Court: Overruled.

Mr. Shapiro: Exception.

A. I respectfully decline to answer that on the ground that it might tend to incriminate me.

Q. You decline to answer?

A. I do.

Q. No. 5:

"Q. Does the T and R Trucking Company provide trucking services between Young Tempo, Incorporated, in New York City and the Acme Dress Company in Midvale, New Jersey?" And I direct you to answer the question.

Mr. Shapiro: I object to the question and the direction, your Honor.

The Court: Overruled.

Mr. Shapiro: Exception.

[fol. 50] A. Again I say I must decline to answer that question on the ground it might tend to incriminate me.

Q. You decline to answer?

A. I do.

Q. And sixth:

"Q. Mr. Levine, do you know if the T and R Trucking Company or the T and R Cutting Company has applied for or obtained a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, New York, and Midvale, New Jersey?" And I direct you to answer.

Mr. Shapiro: I object to the question and to the direction.

The Court: Overruled.

Mr. Shapiro: Exception.

A. I must decline to answer the question upon the ground that it might tend to incriminate me.

Q. And you refuse to answer?

A. I do.

The Court: Very well.

Mr. Wachtell: The Government would further request, your Honor, if the Court would wish to put to the witness the general inquiry as to whether he would answer these questions or any of them, should he be directed to return to the Grand Jury and do so.

Mr. Shapiro: I object to that, your Honor.

The Court: Overruled.

Q. You have been directed to answer these questions. If you return to the Grand Jury room with the Grand Jury and you are asked those questions, would you still decline to answer?

Mr. Shapiro: I object to the question, your Honor. [fol. 51] The Court: Overruled.

Mr. Shapiro: Exception.

A. I must decline to answer these questions, sir, on the ground that they may tend to incriminate me before the Grand Jury.

Q. And you would continue to so decline?

Mr. Shapiro: I object to that.

The Court: Overruled.

Mr. Shapiro: Exception.

Q. Is that so?

A. I would, sir.

The Court: Very well.

Mr. Wachtell: At this time, if your Honor please, the Government would request that the Court adjudge Mr. Levine in contempt of this Court for a violation of the lawful order and direction of the Court under Title 18, United States Code, Section 401, Subdivision 3 and in pursuance of Rule 42(a) of the Federal Rules of Criminal Procedure for a contempt committed in the physical presence of the Judge.

The Court: You may step down.

(Witness excused.)

I will listen to any reason why I should not so adjudicate this witness in contempt.

Mr. Shapiro: If your Honor please, there are several reasons why this witness should not be adjudicated in contempt.

First of all, without repeating each and every objection and statement—

The Court: You do not need to repeat.

Mr. Shapiro: Yes, but the procedure as I respectfully stated is bad and not in accordance with the requirements [fol. 52] of due process and not in accordance with the requirements of Rule 42(b) of the Rules of Criminal Procedure and is violative of this man's constitutional rights, and therefore the procedure is bad and there is no basis for such a judgment to stand.

The immunity which your Honor has found to extend to this witness, I respectfully submit, does not extend, that Section 305(d) of the Motor Carriers Act does not apply to proceedings before a Grand Jury, and for all the other reasons stated by me during the course of this proceeding, and I respectfully ask your Honor not to adjudicate Mr. Levine in contempt of Court.

The Court: Mr. Levine, I am forced by reason of your conduct and your failure to answer to adjudicate you in contempt and I am prepared now to sentence.

Mr. Wachtell: On the question of sentence, your Honor, the identical factors which the Government brought to the attention of the Court in the matter of the witness Emanuel Brown, a portion of which has been read here this morning by Mr. Shapiro, may be applied to the present case of Mr. Levine. Again he is obstructing a very serious Grand Jury investigation and is doing so, although the Government is willing by virtue of the statute and authority to give him full and complete immunity from any prosecution against himself as to any matter as to which he might testify.

Now the Government for these reasons feels that a substantial sentence, and I would use the term again, is called for and it is not for its punitive effect but for a coercive effect upon this witness.

The Government again will ask that in pronouncing sentence this Court should not include what is commonly referred to as a purge clause. Again for the reason that [fol. 53] the Government stated in the matter of Mr. Brown the same end can be reached by this Court should the witness decide to testify under Rule 35 of the Federal Rules of Criminal Procedure, and a purge clause would only serve to give him the possibility of defeating the Grand Jury investigation at any time.

That is all the Government has to say on that point, your Honor.

The Court: Very well.

Mr. Shapiro: If your Honor please, may I be heard on sentence?

The Court: Yes.

Mr. Shapiro: I would like to point out to your Honor, although I am sure that your Honor is aware of it, that the section, I believe it is Section 322, of the Motor Carriers Act under which this purported investigation—under which this investigation purports to proceed, is a section which has a penalty which imposes no jail sentence and imposes only a monetary fine, except in cases of employees of the Commission who may violate certain restrictions of confidential communications, but so far as individuals who are subject to this Act, any offense under that Act is punishable only by a fine, a monetary consideration.

If your Honor please, the Government obviously, therefore, is here asking your Honor to punish this man or to coerce him, not for the purpose of a crime under the Motor Carriers Act, but for some other purpose, for some other reason, which in my opinion shows to this Court that the real purpose of this investigation is not an offense under the Motor Carriers Act, and that whereas, if this man were prosecuted or even if he gave testimony under this so-called immunity which incriminated anybody else, the Court could not sentence such an individual as this [fol. 54] witness to any jail sentence. All that would be involved would be a fine.

I therefore suggest to your Honor that the punishment of this alleged contempt should be coterminous with or equivalent to the nature of the offense that is involved

in the investigation and not the other purposes and other subject matter sought by the Government.

The Court: Mr. Shapiro, the two have nothing to do with each other, in my humble opinion. This is not a violation primarily of the Motor Carriers Act, but it is more than that. It is an obstruction of justice to the United States Government.

I do not follow you to the extent that this would inferentially permit a defendant to refuse to testify, to pay a fine and be absolved. I cannot follow this philosophy. I must therefore sentence the witness.

Mr. Wachtell: May I inquire whether your Honor, when you use the expression "obstruction of justice," are you referring to this witness' conduct here at this time?

The Court: Yes.

Mr. Wachtell: Thank you.

The Court: I therefore sentence this witness to one year. I will entertain a motion for bail pending appeal. * * *

[fol. 55]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 2—October Term, 1958.

Docket No. 24669

UNITED STATES OF AMERICA, Appellee,

—v.—

MORRY LEVINE, Defendant-Appellant.

OPINION—June 2, 1959

BEFORE:

Clark, Chief Judge, Waterman, Circuit Judge, and Galston, District Judge.

Appeal from the United States District Court for the Southern District of New York, Richard H. Levet, Judge.

Morry Levine appeals from a conviction of criminal contempt for refusing to answer certain questions put to him by the court in the presence of the grand jury. Affirmed.

[File endorsement omitted]

[fol. 61] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 62]

SUPREME COURT OF THE UNITED STATES

No. 164—October Term, 1959

MOSES LAVINE, Petitioner,

—vs.—

UNITED STATES OF AMERICA.

ORDER ALLOWING CERTIORARI—October 19, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted limited to Questions No. 1 and No. 2 presented by the petition which read as follows:

"1. Whether the secrecy of the proceedings, including the adjudication and sentence for contempt under Rule 42(a) of the Federal Rules of Criminal Procedure, deprived petitioner of Due Process of Law in violation of the Fifth Amendment to the United States Constitution.

"2. Whether the secrecy of the proceedings and of the adjudication and sentence of petitioner for criminal contempt under Rule 42(a) of the Federal Rules of Criminal Procedure deprived petitioner of a public trial as required by the Sixth Amendment to the United States Constitution."

[fol. 58]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,

—v.—

MOSES LEVINE, Defendant-Appellant.

JUDGMENT—June 2, 1959

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO, Clerk.

[File endorsement omitted]

[fol. 59]

IN UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

ORDER STAYING MANDATE AND CONTINUING BAIL—
June 22, 1959

A motion having been made herein by counsel for the appellant to stay the issuance of mandate and to continue bail pending application for a writ of certiorari to the Supreme Court of the United States,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted.

A. Daniel Fusaro, Clerk. By David P. Jordan, Jr., Chief Deputy Clerk.

Myron L. Shapiro, New York City, for defendant-appellant.

[fol. 56] Mark F. Hughes, Jr., Asst. U.S. Atty., S.D. N.Y., New York City (Paul W. Williams, U.S. Atty., and Alvin C. Martin and Arthur R. Kramer, Asst. U.S. Attys., New York City, on the brief), for appellee.

Per Curiam:

Having refused to answer questions before a federal grand jury despite the direction of the district court that he do so, appellant was again brought before the district judge, who in the presence of the grand jury addressed the same questions to him, explicitly directed him to answer them, and, upon his refusal to do so, adjudged him guilty of criminal contempt and sentenced him to one year's imprisonment. The propriety of Levine's sentence and of the procedures below leading to his conviction has been recently approved in Brown v. United States, 359 U.S. 41, affirming United States v. Brown, 2 Cir., 247 F.2d 332, as was the efficacy of the immunity from prosecution granted him under §2905(e) of the Motor Carrier Act, 49 U.S.C. §305(d). Hence the errors assigned as to them must be overruled. Similarly, there is no merit in appellant's contention that he was improperly denied compulsory process to prove before the district judge that the grand jury was not in fact investigating violations of the Motor Carrier Act. We know of no decision allowing a witness before a grand jury to probe into the purposes of its investigation or suggesting that the immunity from prosecution granted him would not be valid unless he did so. Levine appeared before the district court as a witness, not a party, Brown v. United States, supra, 359 U.S. 41; as such his claim of a right to compulsory process is as much without basis as his contention that the Court's [fol. 57] very act of propounding the questions to him violated his privilege against self-incrimination. 359 U.S. 41, 50 n. 10. He raises no other points of merit on this appeal.

Affirmed.

Supreme Court of the United States

OCTOBER TERM, 1959

No. 164

MORRY LEVINE,

Petitioner,

—against—

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MYRON L. SHAPIRO and J. BERTRAM WEGMAN,
Counsel for Petitioner,
Office & P. O. Address,
60 Wall Street,
New York 5, N. Y.

Dated June 24, 1959

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Supreme Court of the United States

OCTOBER TERM, 1958

No.

MORRY LEVINE,

Petitioner,

—against—

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Morry Levine, respectfully prays that this Court issue its Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment of the United States District Court for the Southern District of New York, convicting petitioner of criminal contempt for petitioner's refusal to answer questions put to him by the Court in the presence of the grand jury. The sentence imposed was 12 months. Petitioner was enlarged on bail of $5,000. pending appeal. The Court of Appeals has granted a stay of its mandate pending final disposition by this Court.

Opinion Below

The *per curiam* opinion of the Court of Appeals has not been officially reported and is printed *infra* at page 29.

The District Court's decision on the questions of law is not officially printed but appears *infra* at page 8.

Jurisdiction

The judgment of the Court of Appeals was dated and entered on June 2, 1959.

Jurisdiction to review such judgment by the Writ prayed for is conferred on this Court by §1254, Title 28, U. S. C. and is invoked pursuant thereto and Rule 37(b) of the Federal Rules of Criminal Procedure.

Questions Presented For Review

1. Whether the secrecy of the proceedings, including the adjudication and sentence for contempt under Rule 42(a) of the Federal Rules of Criminal Procedure, deprived petitioner of Due Process of Law in violation of the Fifth Amendment to the United States Constitution.

2. Whether the secrecy of the proceedings and of the adjudication and sentence of petitioner for criminal contempt under Rule 42(a) of the Federal Rules of Criminal Procedure deprived petitioner of a public trial as required by the Sixth Amendment to the United States Constitution.

3. Whether the denial by the District Court of compulsory process violated petitioner's rights under the Sixth Amendment to the United States Constitution.

4. Whether, notwithstanding the decision of this Court in *United States* v. *Brown*, 359 U. S. 41, the procedure followed herein resulting in petitioner's conviction of criminal contempt under Rule 42(a), Federal Rules of Criminal Procedure, deprived petitioner of Due Process, constituted the proceedings abhorrent to the concepts of the fundamental fairness requisite in Federal criminal proceedings and emasculated the scope and force of Rule 42(b) of the Federal Rules of Criminal Procedure.

5. Whether, notwithstanding the decision of this Court in *United States* v. *Brown, supra*, because of its direct conflict with the decision of this Court in *Clark* v. *United States*, 289 U. S. 1, the revival of purgation by oath, as exemplified by the proceedings in *United States* v. *Brown, supra*, and in this case, ought to be reconsidered and rejected and the Government remitted in this case and similar cases to proceedings under Rule 42(b) of the Federal Rules of Criminal Procedure.

6. Whether the sentence of 12 months imposed upon petitioner constituted cruel and unusual punishment or an abuse of the District Court's discretion.

Constitutional Provisions, Statutes and Regulations Involved

The pertinent Constitutional Provisions, Statutes and Regulations being lengthy are set forth as an appendix to this petition *infra*, p. 32, *et seq.* and their citations follow: United States Constitution, Amendments V, VI and VIII; Federal Rules of Criminal Procedure, Rules 42(a) and 42(b).

Statement of the Case

Petitioner is a principal in interest of Young Tempo, Inc., a New York dress manufacturer and of Acme Dress Company, located in Midvale, New Jersey (20a, 24a).*

T. & R. Trucking Company has transported dresses for Young Tempo, Inc. and Acme Dress Company between New York City and Midvale, New Jersey (23a, 24a).

John Dioguardi is, according to the government's information, the actual owner of T. & R. Trucking Company, although Theodore Rij is the nominal proprietor. In the

* References thus are to the Appendix to Petitioner's Brief in the Court of Appeals, copies of which are being filed herewith.

Southern District grand juries are conducting a general racketeering investigation, as well as an investigation of the Victor Riesel obstruction of justice case. The subjects of these investigations are Dioguardi and Rij (also known as Ray) and possibly others (42a).

Petitioner appeared on numerous times before two of these other grand juries pursuant to subpoena (32a). Petitioner's first appearance related to the Riesel obstruction of justice case and the location of Rij. Petitioner's subsequent appearances were before a grand jury investigating alleged racketeering in the garment trucking industry. At the time of the proceedings below, petitioner was still subject to the subpoena under which he appeared before the other grand juries, his further appearance pursuant thereto having been adjourned.

Before the other grand juries, petitioner was told by the prosecutor that he was to be indicted (10a, 32a) for a violation of the Internal Revenue laws. Other business associates of petitioner, also witnesses before the same grand jury were told by the same prosecutor that they were going to be indicted for violation of the Internal Revenue laws.

On or about March 25th petitioner's counsel, at the prosecutor's request, attended at his office (15a, 21a) and was told that the government was about to institute an investigation under the Interstate Commerce Act, that petitioner would be subpoenaed to appear before the grand jury conducting this investigation and that the immunity statute contained in the Interstate Commerce Act (Section 46, Title 49, U. S. C. A.) would apply and that the Fifth Amendment plea could not be interposed.

Thereafter petitioner was served with a subpoena requiring his personal appearance before the April, 1957 grand jury "to testify all and everything which you may

know in regard to an alleged violation of Sections 309, 322, Title 49 United States Code" (19a, 20a).

Petitioner's counsel was present in the anteroom and petitioner was advised that he could on reasonable request consult with his attorney (18a).

Petitioner, after the preliminaries were disposed of was asked (20a): "Mr. Levine, are you associated with Young Tempo, Inc."?

Petitioner requested and received permission to consult with his attorney (20a). After such consultation, petitioner returned to the grand jury room, the question was read to him again and he answered "I must refuse to answer that question on the grounds that it may tend to incriminate me" (20a).

The prosecutor then advised petitioner "that this Grand Jury is conducting an investigation into possible violation of the Interstate Commerce Laws * * * more specifically, the sections of the United States Code that were specified on the subpoena served upon you * * *" and "that in Title 49, United States Code, Section 305(d), the Congress * * * has provided that any witness who is compelled to give testimony as to any matter arising under the Motor Carrier Part * * * shall, by virtue of his testimony, be given full and complete immunity * * *" and that he did "not have any privilege to plead the Fifth Amendment before this Grand Jury in this inquiry" (20a, 21a).

The grand jury foreman then directed petitioner to answer the questions previously asked by the prosecutor. Petitioner again refused to answer on the ground of possible self-incrimination (22a).

Petitioner again consulted with his counsel and once more refused to answer the question on the ground of possible self-incrimination (22a, 23a). Thereafter five more questions were put to petitioner by the prosecutor,

all of which petitioner refused to answer on the ground of possible self-incrimination (23a, 25a).

The questions which petitioner refused to answer, because of possible self-incrimination, are:

> "1. Mr. Levine, are you associated with Young Tempo, Inc.? (20a). 2. Mr. Levine, does Young Tempo, Inc. use a trucking company known as the T. & R. Cutting Company or the T. & R. Trucking Co.? (23a). 3. Mr. Levine, who do you know to be the owner or owners or the principal in interest or principals in interest of the T. & R. Cutting or the T. & R. Trucking Company? (23a). 4. Mr. Levine, are you associated with Acme Dress Co. in Midvale, New Jersey? (24a). 5. Mr. Levine, does the T. & R. Trucking Co. provide trucking services between Young Tempo, Inc. in New York City and the Acme Dress Co. in Midvale, New Jersey? (24a). 6. Mr. Levine, do you know if the T. & R. Trucking Co. or the T. & R. Cutting Company has applied for or obtained a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, New York and Midvale, New Jersey?" (24a, 25a).

After the refusal of petitioner to answer the above questions, the grand jury, prosecutor and petitioner and his counsel proceeded to District Judge Levet's courtroom (7a).

The prosecutor outlined the procedure requested by the government to be followed and on behalf of the grand jury requested the aid and assistance of the court in a direction to petitioner to answer the questions (7a, 8a). The courtroom was cleared.

The prosecutor stated that the government requested that the court follow the identical procedure followed in the case of *Emanuel Brown* v. *United States*, then on appeal and subsequently decided by this Court, 359 U. S. 41.

In essence that procedure was, as outlined by the prosecutor and followed by the court, a determination pre-

liminarily by the court as to whether the witness had to answer the questions and, if so, a direction that he answer the questions, the return of the witness to the grand jury room and upon his further refusal to answer the questions before the grand jury, the return of the grand jury to the court with the second request that the same questions be put by the court to the witness and, if the witness then refused to answer, the government would ask that he be held summarily in contempt in accordance with Rule 42(a), Federal Rules of Criminal Procedure.

Petitioner's counsel requested (8a, 9a) an adjournment, notice under Rule 42(b) of the Federal Rules of Criminal Procedure, a specification of charges and an opportunity to prepare for trial.

Petitioner's counsel also requested the Court (9a) to grant petitioner compulsory process to require the production and attendance of witnesses so that the issues of fact on the hearing could be met. Compulsory process was requested by petitioner's counsel for the United States Attorney in the Southern District, the minutes of the grand jury in this investigation, the Interstate Commerce Commission and Justice Department, as well for the production of the charge by the court to this grand jury and the *voir dire* of this grand jury at the time of its empanelling (9a, 10a).

The court denied the motion for adjournment, for compliance with Rule 42(b) of the Federal Rules of Grand Jury and for compulsory process (11a-17a).

The grand jury stenographers were then called by the government (17a, 18a, 19a, *et seq.*). They read their transcribed minutes of the proceedings in the grand jury room (17a, *et seq.*). Thereupon petitioner's counsel renewed his prior motions and applications, which were again denied (26a, 27a).

Argument was then had on the applicability of the Immunity Sections of the Motor Carriers Act [Title 49, U. S. C. A. §305(d)] (29a, *et seq.*)

The court rendered its decision as follows (35a):

> "Now under the circumstances and upon all the facts and upon all the record, and for the reason which I set forth at the time of the disposition of a similar matter, in the matter of the witness Emanuel Brown, I am forced to conclude that the immunity is there, that the witness must answer, and I therefore direct him to answer the questions which were set forth by the witnesses from the Grand Jury who testify today."

The grand jury was then recessed by the court until Monday, April 22, 1957 at 10:30 A.M. with a direction to the petitioner to attend (36a).

Pursuant to the court's direction petitioner returned to the grand jury room at the time appointed and there the prosecutor put to him the six questions directed to be answered (45a, *et seq.*), which petitioner refused to answer on the claim of his privilege against self-incrimination.

The grand jury, petitioner and counsel then proceeded to the courtroom of District Judge Levet (36a).

The courtroom was cleared at the direction of the court (36a, 37a) and the proceedings were thenceforth held in secret.

At that time the prosecutor stated to the court that "the April 1957 regular Grand Jury once again requested the assistance of the court in regard to the witness Morry Levine (petitioner)" (37a).

Application was then made by petitioner's counsel that the court follow the requirements of Rule 42(b) of the Federal Rules of Criminal Procedure and due process and that petitioner be furnished with notice of the charges and an opportunity to prepare and to frame the defenses

to the charges (37a-43a). The court overruled the application (40a-43a).

Petitioner's counsel also requested an adjournment so that he might subpoena witnesses and apply for compulsory process and renewed all the motions and applications which he had made at the prior session (40a-43a).

These motions and applications were overruled by the court (40a-43a).

The grand jury stenographer read her untranscribed minutes (44a, *et seq.*) which disclosed that petitioner had once more refused in the grand jury room to answer the six questions set forth above on the ground of possible self-incrimination.

The prosecutor then requested that the court put to petitioner the questions refused by him to be answered and to direct him to answer the same (46a).

Over petitioner's objection the court directed him to take the stand in the courtroom (46a, 47a).

The court did not swear petitioner but stated that he was "still under oath • • • with respect to what is said here, and with respect to any testimony • • •" (47a).

On inquiry by his counsel as to whether the proceeding was "the grand jury proceeding", or "a contempt proceeding" the court stated that it was "the Court and the Grand Jury" (47a) and that it was a "proceeding in accordance with Rule 42(a)" (47a).

Petitioner's counsel objected to the procedure, requested that the court proceed in accordance with Rule 42(b) and objected to petitioner "being put on the stand in a proceeding in which he is in jeopardy and which involves the possibility of a criminal contempt and being required to testify in a proceeding in which he is in jeopardy in violation of his constitutional rights" (47a).

The court overruled the applications and objections (48a).

The court then put to petitioner the same six questions (*supra*, p. 6) over the specific objection of petitioner's counsel to each question and to each direction (48a-51a), and as to each such question he refused to answer on the ground of possible self-incrimination (48a-51a).

The court then at the request of the prosecutor inquired of petitioner whether, if he returned to the grand jury room, he would still decline to answer (50a). The court overruled petitioner's counsel's objection to this question and petitioner answered that he "must decline to answer these questions * * * on the ground that they may tend to incriminate him before the grand jury" (51a).

The prosecutor then requested the court to "adjudicate" petitioner "in contempt of this court for a violation of the lawful order and direction of the court * * * for a contempt committed in the physical presence of the Judge" (15a).

After listening to petitioner's counsel's reasons (51a, 52a) why petitioner should not be adjudicated in contempt, the court stated that he was forced by reason of petitioner's conduct and failure to answer to adjudicate him in contempt (52a).

Counsel for the government was then heard by the court on the question of sentence and in that regard he said, among other things, the following (52a, 53a):

> "Now the Government for these reasons feels that a substantial sentence, and I would use the term again, is called for and it is not for its punitive effect but for a coercive effect upon this witness.
>
> "The Government again will ask that in pronouncing sentence this Court should not include what is commonly referred to as a purge clause."

After hearing petitioner's counsel on the question of the quantum of sentence, the court sentenced petitioner

to be confined for a period of one years and admitted him to bail pending appeal (54a).

ARGUMENT

The reasons relied on by petitioner for the allowance of the writ are these:

1. The decision below is in conflict with the decisions of other Courts of Appeals on the same matter;

2. The Court below has rendered a decision in conflict with applicable decisions of this Court;

3. The Court below has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the Trial Court as to call for an exercise of this Court's power of supervision;

4. The Court below has decided important questions of Federal law which have not been, but should be, settled by this Court.

I.

This case presents to this Court for review an aspect of the proceedings in the Second Circuit for the handling of recalcitrant grand jury witnesses which was not decided in *United States* v. *Brown*, 359 U. S. 41.

In the *Brown* case, *supra*, as indicated in footnote 11, this Court did not consider petitioner's claim that "the District Court proceeding was conducted in 'secrecy', because the record does not show this to be the fact".

In this case, however, the record is unmistakably clear that the proceedings throughout were secret (36a, 37a).

Consequently in contravention of this Court's decision in *Re Oliver*, 333 U. S. 257, not only the proceedings leading up to the summary conviction for criminal contempt, but also the actual adjudication and sentence were held *in camera*.

The factual situation in this case is particularly apposite to that of the *Oliver* case, *supra*.

In the *Oliver* case a Michigan Circuit Judge sat as a one man grand jury thereby constituting in one person a "Judge-Grand Jury" and this bi-morphic entity put the questions to the witness and upon his allegedly contumacious conduct before it held the witness guilty of criminal contempt and sentenced him to jail.

In this case similarly the federal grand jury of 23 persons and the judge were converted into a "Judge-Grand Jury" and as a bi-morphic entity, put the questions to petitioner and on his refusal to answer held petitioner in contempt and sentenced him to jail.

Indeed the District Court was asked (47a) when the petitioner was called to the stand in the courtroom "What is this proceeding now? Is this the Grand Jury proceeding, or is this a contempt proceeding?" The Court replied "The Court and the Grand Jury".

The secrecy of such proceedings was condemned by this Court in the *Oliver* case, *supra*. Mr. Justice Black in that case at page 264 clearly pointed out the reasons why the requirements of grand jury secrecy cannot apply to contempt proceedings for the witness's alleged misbehavior before the grand jury.

Mr. Justice Black said:

> "* * * It has long been recognized in this country however that the traditional 12 to 23-member grand juries may examine witnesses in secret sessions. * * * Many reasons have been advanced to support grand jury secrecy. * * * But those reasons have never been thought to justify secrecy in the trial of an accused charged with violation of law for which he may be fined or sent to jail. Grand juries investigate, and the usual end of their investigation is either a report, a 'no-bill' or an indictment. They do not try and they do not convict. They render no judg-

ment. When their work is finished by the return of an indictment, it cannot be used as evidence against the person indicted. Nor may he be fined or sentenced to jail until he has been tried and convicted after having been afforded the procedural safeguards required by due process of law. *Even when witnesses before grand juries refuse to answer proper questions, the grand juries do not adjudge the witnesses guilty of contempt of court in secret or in public or at all. Witnesses who refuse to testify before grand juries are tried on contempt charges before judges sitting in open court. • • • the due process clause may apply with one effect on the judge's grand jury investigation, but with quite a different effect when the judge-grand jury suddenly makes a witness before it a defendant in a contempt case.*

"Here we are concerned, *not with petitioner's rights as a witness in a secret grand jury session*, but with his rights as a defendant in a contempt proceeding. The powers of the judge-grand jury who tried and convicted him in secret and sentenced him to jail on a charge of false and evasive swearing must likewise be measured not by the limitations applicable to grand jury proceedings, but by the constitutional standards applicable to court proceedings in which an accused may be sentenced to fine or imprisonment or both." [Emphasis supplied]

While it is true that petitioner's counsel was present throughout the proceedings in the courtroom, it is nevertheless also true that a "secret proceeding is no less secret because the defendant is allowed to have counsel" (Warren, Ch. J., *Brown* v. *United States*, *supra*, fn. 15).

The evils inherent in a secret proceeding are not lessened or eradicated by the fact that counsel for the accused is also present. The opportunity for intimidation or persecution and the consequent possible abuse of judicial power remain. The advocate militant in such *in camera* proceedings may indeed merely be another candi-

date for a contempt adjudication. Compare *Sacher* v. *United States*, 343 U. S. 1, especially dissenting opinions at pp. 14, *et seq.*

The necessity of restraint upon the judiciary based upon other than their self control has been recognized by this Court and the most potent force in this regard is publicity, because as Mr. Justice Black said in the *Oliver* case at page 270 the "knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."

Indeed, even if it may be said that requiring publicity for proceedings such as these involving a grand jury investigation may impair the investigative powers of the inquest, the choice must be made in favor of Due Process and fair play as against secret inquisition. This Court made a comparable choice in *Jencks* v. *United States*, 353 U. S. 657, as did the Second Circuit Court of Appeals in *United States* v. *Andolschek*, 142 F. 2d 503.

II.

The imposition of secrecy in this proceeding violated the Sixth Amendment to the United States Constitution which guarantees a public trial in all criminal prosecutions.

This Court has held that in proceedings which result in a judgment of criminal contempt, the defendant is entitled to the rights accorded to the defendant in criminal cases. *Cammer* v. *U. S.*, 350 U. S. 399, 403; *Re Michael*, 326 U. S. 224; *Nye* v. *U. S.*, 313 U S. 33; *Michaelson* v. *U. S.*, 266 U. S. 42, 66; *Gompers* v *Buck's Stove & Range Co.*, 221 U. S. 418, 444.

The defendant in a criminal contempt case should be held to be entitled also to the guarantee of a public trial.

The rationale of the requirement of a public trial is grounded on firm principles—adherence to which has always been thought to be vital to a free democratic society.

As pointed out[4] by Mr. Justice Black in the *Oliver* case, *supra*, at page 268:

> "The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the lettre de cachet. All of these institutions obviously symbolized a menace to liberty. In the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial. Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."

While it has been held that in the absence of objection the accused in a criminal case subjected to a trial *in camera* will be deemed to have waived the guarantee of a public trial, there are cases which in their holdings are more consonant and consistent with the preservation of this basic right and which should be followed here.

Thus, in *State* v. *Hensley*, 75 Ohio St. 255, the Court held against the waiver by silence of the guarantee of a public trial saying:

> "It is, however, insisted by counsel for the state that, because no specific objection or exception was

entered by the defendant at the time the order was made or was being enforced, the error, if any was committed, cannot now be taken advantage of. This objection ignores the force and effect of the constitutional provision. The right to a public trial is guaranteed. It is of the same high order of right as the other guaranties embodied in the section,—that to appear and defend in person and with counsel, that to meet the witnesses face to face and have compulsory process, and that to a trial by jury. The right cannot be waived by silence any more than can the right to be tried by jury where the accusation is a felony and the plea is not guilty. This right should not be confused with a claim, sometimes made, that a reversal should be ordered where a jury has been obtained in a way not strictly conforming to the statute. The manner of selecting the jury is matter of procedure only; and this court has often held that objection to the mode must be made at the time, but that an impartial jury must be obtained, and, if that result is reached, the accused is not harmed."

See also *State* v. *Delzoppo*, 86 Ohio App. 381; *E. W. Scripps Company* v. *Fulton*, 100 Ohio App. 157; *People* v. *Jelke*, 308 N. Y. 56.

Hence, in view of the denial of Due Process and the violation of the guarantee in the Sixth Amendment to a public trial which occurred in this case serious questions are presented for consideration by this Court and certiorari should be granted to review the same.

III.

In this case petitioner's counsel requested that the court grant the witness compulsory process to require the production of evidence and the attendance of witnesses (9a).

The government argued that, since petitioner's counsel

had been in the *Brown* case, *supra*, he should have had his subpoenas out prior to then (15a) but, as pointed out to the court, there was no case, no proceeding involving this petitioner before he was actually brought before the grand jury. It was not and is not possible in the absence of a case to go to the clerk of the District Court and request subpoenas in a case which is not pending. It would have no caption. There would be no jurisdiction to issue them. It was only, as petitioner's counsel pointed out, when petitioner was for the first time brought before the court that there was some proceeding pending in which compulsory process might have been requested.

It was also argued to the court that the evidence sought to be obtained by the compulsory process would be inadmissible, but assuming *arguendo* that to be so, the simple answer is that the court can rule on the evidence, when it is offered, but it cannot prevent a defendant's counsel from obtaining and using the compulsory process of the court to obtain evidence. It is elementary that inadmissibility is determined when evidence is offered (15a, 16a).

The court, however, refused (16a) to issue compulsory process then, as well as when the petitioner was once more brought before the court (40a-43a).

Not only was the issuance of compulsory process essential on the issues of fact inherent in the case, but also on the question of possible extenuation of the contempt. By the denial of compulsory process petitioner was denied the opportunity to "demonstrate extenuating circumstances", *Brown* v. *United States*, *supra*, dissenting opinion. And as Mr. Chief Justice Warren pointed out in the *Brown* case, *supra*, the assertion that only a legal issue was involved here "overlooks the right of petitioner to present evidence in extenuation."

Consequently petitioner has been deprived of a basic constitutional right guaranteed to him by the Sixth Amendment to the Constitution and the intervention of this Court is required to redeem this constitutional right.

IV.

While in *Brown* v. *United States, supra,* this Court decided the procedural questions presented here adversely to that petitioner, this petitioner urges that that decision is one which ought to be reconsidered and redecided, as otherwise, were it to remain unassailed, it would be not only a blow but a continuing threat to Due Process and that fundamental fairness so devoutly espoused in the judicial administration of our criminal law.

It is believed that it is unnecessary at this point to restate the arguments made to this Court in the *Brown* case, *supra,* or to remind the Court of the cogent and persuasive reasoning set forth in the dissenting opinion in the *Brown* case. Suffice it to say that on all the points urged in the *Brown* case and in that dissenting opinion the holdings in *Brown* on the procedural questions should be once more considered by this Court and that this petitioner should be permitted by means of a writ of certiorari to reargue these points to the Court.

It is necessary, however, to point out certain matters which were obviously not apparent until after the determination of the *Brown* case.

The *Brown* case, *supra,* in substance and in effect, revived the doctrine of "purgation by oath" finally and effectively rejected by this Court in *Clark* v. *United States,* 289 U. S. 1, 19. There Mr. Justice Cardozo said that "little was left of that defense after the decision of this Court in *United States* v. *Shipp,* 203 U. S. 563, 574" that the doctrine "has even lost * * * the title to respect that comes of a long historical succession" and that "the time

has come, we think, to renounce the doctrine altogether and stamp out its dying embers".

In spite of this unequivocal and decisive renunciation of "this intrusion or perversion of the canon law" [Holmes, J., *United States* v. *Shipp*, 203 U. S. 563, 574], this Court in the *Brown* case, *supra*, breathed a smouldering life into its embers, long ago thought to have been extinguished in the Federal courts. See *41 Harv. L. Rev. 61; People* v. *Gholson*, 412 Ill. 294.

Simple analysis of this Court's opinion in *Brown* demonstrates that it created a life after death for "purgation by oath."

In this Court's opinion in *Brown* it is stated that that petitioner "was for the first time guilty of contempt" when he again refused to answer the grand jury's questions "upon his return to the grand jury room after the District Court had ruled on the question of immunity." Thus, then and there was a complete crime prosecutable by notice and hearing under Rule 42(b). (See this petitioner's Appendix, 39a, 40a).

But, this Court went on to hold that the District Court could then put a recalcitrant witness on the stand and afford him the opportunity to purge this completed crime of contempt by answering the grand jury's question before the Judge—clearly, purgation by oath and that, if he refused, as this petitioner did, to purge himself, he was guilty of contempt summarily punishable under Rule 42(a).

In *United States* v. *Brewster*, 154 F. Supp. 126 [*reversed on other grounds*, 255 F. 2d 899 (C. A., D. C.)] the defendant on an indictment for contempt of the United States Senate argued that, even if he had been in contempt in refusing to answer certain questions before a subcommittee, he had nevertheless "purged" himself by subsequently furnishing the required information to the

Select Committee. The District Court, holding that the contempt was criminal, stated that "the defense of purging in criminal contempt has been abolished" and that "this defense is no longer valid."

If *Clark* v. *United States, supra,* is still the law, then the decision in this case and *Brown* v. *United States, supra,* is in direct conflict therewith. If the *Clark* case had been followed in *Brown,* this Court could not have concluded that, if that witness had answered the grand jury's questions before the Judge, he would have purged himself of his contempt before the grand jury.

Particularly apposite here, because its conflict in principle with this case is so clear, is this Court's decision in *United States* v. *Norris,* 300 U. S. 564. There, in a trial for perjury the defense was urged that before the same tribunal the witness had retracted and corrected his falsehoods and thus his crime was purged. This Court gave the perjurer no *locus poenitentiae*—it held the perjury complete when uttered and hence indictable and not subject to purgation.

So here, too, as in *Brown,* there is and was no real place of penitence for petitioner for his overt refusal to answer in the grand jury room—unless the *Norris* and *Clark* cases, *supra,* are to be deemed overruled by *Brown, supra.*

Nor is the impact of the *Clark* and *Norris* cases, *supra,* overcome or even blunted by the theory adopted by the Court in *Brown, supra,* of a "continuing contempt"—more accurately to be described as an "open-end" crime.

The Court in holding in *Brown, supra,* that a witness's refusal to answer before the Judge was an act "continuing his contempt" necessarily overlooked (1) that it had held he could have been prosecuted under Rule 42(b) for criminal contempt for his refusal to answer in the grand jury room after the Court's direction to answer

and (2) that under the *Clark* and *Norris* cases, *supra*, a recalcitrant witness can still be so prosecuted.

It cannot be said that the crime of criminal contempt was not complete when done in the grand jury room (see 39a, 40a). If that were so, this Court could not say, as it did in *Brown, supra*, that that petitioner could be prosecuted for the refusal in the grand jury room. The crime could not be both complete and incomplete.

In *Brown*, as here, there necessarily had to be two contempts—the one before the grand jury and the one before the court (if that be a contempt). The contempt before the grand jury was an entirely separate crime from the contempt before the court, of which he was convicted. But petitioner by reason of the affirmance in the *Brown* case, *supra*, on the theory of continuing contempt also stands convicted of a crime other than either one of the two which he may have committed.

The certificates of the Trial Judge in both cases make this indisputable. As in *Brown*, the certificate here in no way shows that petitioner was convicted below for continuing before the Court his overt refusals before the grand jury (4a-6a).

This certificate too makes no reference whatsoever to the proceedings before the grand jury, after the Court's direction to petitioner to answer the questions. It also recites merely that petitioner was brought before the Judge and that in the presence of the grand jury, the Judge put the questions to him, that he refused to answer after having been directed to do so, that he failed to state any valid reason why he should not be held in contempt, and that accordingly petitioner was summarily found to be in contempt of court under Rule 42(a).

In *Brown*, this Court, in order to avoid the problem of multiplication of contempts clearly inherent in that and this case, described the crime as a continuing con-

tempt. But for this so-called continuing contempt neither witness was convicted. If either had been convicted of this continuing contempt, then the certificate would have had to recite the proceedings before the grand jury. This each very carefully does not do. The Assistant United States Attorney who prepared each certificate and the District Court Judge who signed both were undoubtedly well aware of the fact that to include the grand jury proceedings in the certificate would necessarily invalidate it, because then, as pointed out by this Court in *Brown*, there would have had to be proceedings under Rule 42(b) and the error would appear plainly on the face of the certificate.

Accordingly, if this Court meant in *Brown* to supply the defect in the Rule 42(a) procedure here by adding to the certificate the matter contained in the Record as to the proceedings before the grand jury, then the certificate as so amended *ad hoc* would be invalid and the conviction should fall. There would seem to have been no disagreement in this Court about this basic rule that, if the proceedings resulting in a contempt took place before a grand jury in its room, then Rule 42(b) must be applied.

And this is a basic distinction between *Brown* and this case and *Yates*, 355 U. S. 66. There the continuing contempt occurred before the same tribunal. Here, while the grand jury concededly is an appendage of the court, proceedings before it are not the same as proceedings before the court, and for the court to take cognizance of contumacious conduct before the grand jury, proceedings under Rule 42(b) must be instituted. By the device of labeling the petitioner's refusal to answer before the District Judge as a continuation of the contempt before the grand jury, this basic difference cannot be obscured.

Even if this Court, by describing *Brown's* refusals as a continuing contempt, intended to imply that such pro-

ceedings, as in this case, before the court are a continuation of the grand jury proceedings, the error is not cured thereby, because what transpires before the grand jury takes place outside of the presence of the court, and in this phase of the contempt the witness is certainly entitled to notice and hearing. Thus, the "rollup" or merger of the refusal before the grand jury into the alleged contempt before the court which is implied in *Brown* in this Court's phrase "finally adjudicating" (Op., p. 11) is impossible.

In sum, this Court held in *Brown* that the conviction of a witness in the posture of petitioner can stand, because he refused to purge himself, when as matter of law long settled by this Court, he could not have purged himself of his contempt in the grand jury room. By answering before the Court he could at the most only avoid a coercive sentence or mitigate his punishment for his contempt before the grand jury. *Wilson* v. *United States*, 65 F. 2d 621 (C. C. A.) 3; *United States* v. *Collins*, 146 Fed. 553, 554.

Consequently for all of the above and upon the arguments and dissenting opinion in *Brown*, the Court should grant certiorari to review this conviction.

V.

In holding in *Brown* that a witness's refusal before the District Judge to answer the grand jury's questions "left the Court no choice" but to convict him of criminal contempt under Rule 42(a), this Court overlooked, it is respectfully submitted, the power of the District Court to commit recalcitrant witnesses, such as this petitioner until he make answer to these questions.

While for the contempt committed in the grand jury room petitioner could only be prosecuted and punished

under Rule 42(b), the District Court, for the purpose of obtaining his answers to the questions and aiding and assisting the grand jury to that end, could commit him until he should make answer thereto. Petitioner does not deny the District Court's coercive power to commit him until he make answer. Petitioner does contend that he could not and should not be convicted summarily of criminal contempt under Rule 42(a) for not having answered the grand jury's questions before the District Court.

This Court in *Brown*, to justify its upholding of this abuse of the summary contempt power, cited a number of decisions of this Court and the Courts of Appeals as "at least *sub silentio*" approving "such a procedure" which its opinion described as "stemming • • • from usages of the common law."

Of the cited cases decided in this Court, not one, openly or silently, furnishes such approval of such summary procedures culminating in punitive sentences for contempt.

In *Hale* v. *Henkel*, 201 U. S. 43, 46, the coercive order of the Circuit Judge committed Hale "to the custody of the Marshal until he should answer the questions and produce the papers." Similarly, in *Wilson* v. *United States*, 221 U. S. 361, 369, 371, the commitment was to the custody of the Marshal until the witness shall perform the required acts. In *Curcio* v. *United States*, 354 U. S. 118, this Court did not approve the procedure there followed and necessarily did not consider that issue, because its sustaining of the Fifth Amendment plea disposed finally of the case. Besides there the six months sentence contained a blanket purge provision.

Much was attempted to be made of *Rogers* v. *United States*, 340 U. S. 367, in the Court's opinion in *Brown*. All that was presented on the procedural questions in that case was whether that petitioner had a right to counsel in a Rule 42(a) proceeding and whether that right to

counsel had been infringed by the summary proceedings there followed. The fundamental questions presented in *Brown* or in this case were not at all submitted to the Court in the *Rogers* case. To show that only the right to counsel was involved in the *Rogers* case, it is necessary only to quote from the next to last sentence of that petition for rehearing, at page 11. This sentence is, "We hope and trust that this court will listen to our plea against this apparent denial by the trial court of so basic a right as the right to be heard by counsel before pronouncement of judgment."

Lopiparo v. *United States*, 216 F. 2d 87, is one of the Courts of Appeals cases cited by this Court in *Brown* as representing approval of the summary contempt procedure followed there and here. There, however, sentence was not to the penitentiary, but to the custody of the Marshal for 18 months or until the further order of the Court should the contemnor produce before the grand jury the required records before the expiration of the sentence or the discharge of the grand jury—in effect, a coercive sentence. In *United States* v. *Weinberg*, 65 F. 2d 394, while the sentence was for a determinate period, the contemnor unlike this petitioner was prosecuted on presentment by the grand jury.

As to the earlier practice at common law, the cited case of *People ex rel. Phelps* v. *Faucher*, 4 Thompson & Cook 467, involved a commitment until the witness should answer. *People ex rel. Hackley* v. *Kelly*, 24 N. Y. 74, is also to be distinguished because it is quite clear that the Court of Appeals held on the record there that the relator had waived all procedural issues "in order to have a prompt determination of the constitutional question involved." In *Re Belle Harris*, 4 Utah 5, the Court there exercised the power of coercion by committing the witness until she should answer the questions. Besides,

this case arose under the Utah Territory statute and not at common law.

In overlooking this clear and unmistakable power of the court to commit the petitioner until he make answer to the grand jury's questions, this Court in *Brown* was led into the error of sanctioning a procedure wholly violative of due process and totally inconsistent with its statement of the purpose of summary proceedings before the Court.

In its opinion in *Brown*, this Court says that a "judge more intent upon punishing the witness than aiding the grand jury in its investigation might well have taken" the course of instituting prosecution of petitioner for criminal contempt under Rule 42(b), but instead the District Court "made another effort to induce the petitioner to testify."

While it would seem that this statement by the Court is intended to be a rephrasing in the terms of the *Brown* case of certain language in *Yates* v. *United States*, 355 U. S. 66, 75, the proceedings in the *Brown* and this case do not at all accord with the phraseology of *Yates*. There, Mr. Justice Clark said, "The more salutary procedure would appear to be that the court should first apply coercive remedies in an effort to persuade a party to obey its orders and only make use of the more drastic criminal sanctions when the disobedience continues." In *Brown* and here, however, there was no imposition of coercive remedies, only a substitution of the more drastic criminal sanctions for the coercive remedies.

If the District Court had applied the coercive remedies and no answers resulted within a reasonable time, it still remained open to commence a prosecution of the petitioner under Rule 42(b) for his overt refusal in the grand jury room. But the District Court did not apply any coercive remedies, and thus in reality proceedings incon-

sistent with this Court's expression in the *Yates* case, *supra*, have been here sanctioned.

VI.

The sentence of one year constituted cruel and unusual punishment and an abuse of the court's discretion. While the question of sentence was primarily for the District Court, there is still a right of review of the quantum of the sentence as recognized by this Court in *United States* v. *Brown*, 359 U. S. 41.

Here petitioner refused to answer questions concededly incriminatory on grounds which had substantial legal basis (*viz.*, *United States* v. *Brown*, 359 U. S. 41) and was then necessarily in a quandary because of the uncertainty at least as to the legal situation confronting him as to his rights under the Fifth Amendment and the purported immunity statute; yet the District Court imposed a cruel and unusual punishment of one year imprisonment.

In Section 322, Motor Carriers Act, Title 49 U. S. C., the section under which investigation was being had by the grand jury, there is no offense for which a jail sentence may be imposed except in a case under subdivision (d) which applies only to certain employees of the Commission. All other violations are punishable only by fine.

Section 309, Title 49 U. S. C., the other section involved in this grand jury investigation, contains no punitive provision.

Thus even if petitioner or any other person incriminated by him were prosecuted for violations of these sections of the Interstate Commerce Act, there could be no jail sentence but the District Court nonetheless imposed the sentence of one year for refusal to answer questions claimed to concern possible violations of this statute.

Attention is called to *Moore* v. *United States*, 150 F. 2d 323 (C. A. 10). There it was held that the penalty attached to the substantive criminal offenses and its seriousness is an element to be considered in determining the reasonableness and oppressiveness of the punishment imposed in the contempt proceedings.

Nor can the alleged contempt here be analogized to a violation of the provisions of the Criminal Code concerning obstruction of justice, Title 18, U. S. C. §§1501, *et seq.* If, as stated in *United States* v. *Brown*, *supra*, it may be so analogized, then under §402, Title 18 U. S. C. the sentence could not exceed six months.

The abuse of discretion inherent in this twelve months sentence is readily apparent from the study and analysis of sentences given in comparable cases contained in Footnotes 11 and 12 of Mr. Chief Justice Warren's dissenting opinion in *United States* v. *Brown*, *supra*.

WHEREFORE, it is respectfully prayed that a writ of certiorari issue to the Court of Appeals for the Second Circuit to review petitioner's conviction here.

Respectfully submitted,

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Dated June 24, 1959

APPENDIX

Per Curiam Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 2—October Term, 1958.

(Argued May 4, 1959 Decided June 2, 1959.)

Docket No. 24669

UNITED STATES OF AMERICA,

Appellee,

—v.—

MORRY LEVINE,

Defendant-Appellant.

Before:

CLARK, *Chief Judge*,
WATERMAN, *Circuit Judge*, and
GALSTON, *District Judge*.

Appeal from the United States District Court for the Southern District of New York, Richard H. Levet, Judge.

Morry Levine appeals from a conviction of criminal contempt for refusing to answer certain questions put

to him by the court in the presence of the grand jury. Affirmed.

MYRON L. SHAPIRO, New York City, for defendant-appellant.

MARK F. HUGHES, JR., Asst. U. S. Atty., S. D. N. Y., New York City (Paul W. Williams, U. S. Atty., and Album C. Martin and Arthur B. Kramer, Asst. U. S. Attys., New York City, on the brief), for appellee.

PER CURIAM:

Having refused to answer questions before a federal grand jury despite the direction of the district court that he do so, appellant was again brought before the district judge, who in the presence of the grand jury addressed the same questions to him, explicitly directed him to answer them, and, upon his refusal to do so, adjudged him guilty of criminal contempt and sentenced him to one year's imprisonment. The propriety of Levine's sentence and of the procedures below leading to his conviction has been recently approved in *Brown* v. *United States*, 359 U. S. 41, affirming *United States* v. *Brown*, 2 Cir., 247 F. 2d 332, as was the efficacy of the immunity from prosecution granted him under §205(e) of the Motor Carrier Act, 49 U. S. C. §305(d). Hence the errors assigned as to them must be overruled. Similarly, there is no merit in appellant's contention that he was improperly denied compulsory process to prove before the district judge that the grand jury was not

in fact investigating violations of the Motor Carrier Act. We know of no decision allowing a witness before a grand jury to probe into the purposes of its investigation or suggesting that the immunity from prosecution granted him would not be valid unless he did so. Levine appeared before the district court as a witness, not a party, *Brown* v. *United States, supra,* 359 U. S. 41; as such his claim of a right to compulsory process is as much without basis as his contention that the Court's very act of propounding the questions to him violated his privilege against self-incrimination. 359 U. S. 41, 50 n. 10. He raises no other points of merit on this appeal.

Affirmed.

Relevant Statutes

FEDERAL RULES OF CRIMINAL PROCEDURE:

Rule 42. Criminal Contempt

(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the fact and shall be signed by the judge and entered of record.

(b) *Disposition Upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

Relevant Statutes

United States Constitution, Amendments V, VI and VIII.

V

"No person • • • shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;"

VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury • • • and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense;"

VIII

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

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812661—59

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 164

MORRY LEVINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

With some differences which we discuss below, this case is a carbon copy of *Brown* v. *United States,* 359 U.S. 41, No. 4, O.T. 1958, decided March 9, 1959. It arose out of the same grand jury investigation (R. 7; Brown R. 6–7) and involves the same judge (Levet, D.J.) and counsel on both sides (R. 7; Brown R. 6). The proceedings which culminated in the petitioner's conviction of contempt occurred just two weeks after Brown's conviction (R. 7, 26, 54; Brown R. 6, 34, 47, 49). The commands of the subpoenas issued to Brown and the petitioner were identical (R. 19; Brown R. 19). The same six questions were put to the two witnesses in identical language. It appears from these questions that Brown and the peti-

tioner were associated in the same businesses. (R. 20, 23–25; Brown R. 19–23.) Obviously, therefore, the grand jury sought from the petitioner the same information Brown had refused to give on his appearances before it. As in Brown's case, the petitioner had previously appeared before other grand juries investigating other matters and he, like Brown, according to their counsel, had been told in the course of those other proceedings that he was to be indicted for violating the "internal revenue laws" (R. 10, 32; Brown R. 28; see Pet. 4).

The procedure in the district court in this case followed the procedure in the *Brown* case (compare Pet. 4–11 with 359 U.S. at 42–44). The petitioner, however, was sentenced to imprisonment for one year (R. 54), whereas Brown's sentence was 15 months (359 U.S. at 52).

Despite the petitioner's plea (Pet. 18–27) that this Court reconsider and overrule that part of the *Brown* decision which sanctioned the summary procedure under Rule 42(a) of the Federal Rules of Criminal Procedure invoked in the district court, and his further plea (Pet. 27–28) that the sentence constituted an abuse of discretion and cruel and unusual punishment, we, like the court of appeals (see Pet. App. 30), see no occasion for a re-examination of these issues so recently decided.[1]

[1] In his plea for reconsideration of the first of these questions, the petitioner argues (Pet. 18–23) that the *Brown* decision is inconsistent with *Clark* v. *United States*, 289 U.S. 1, 19, in that it revived the doctrine of "purgation by oath" which the *Clark* decision renounced. But there is a vast difference between the discarded notion that the oath of a contemnor denying mis-

The petitioner also contends that his case involves issues which were not decided in *Brown*. He claims that he was denied compulsory process to require the production of evidence and the attendance of witnesses (Pet. 16–18) and that the proceedings in the district court violated due process and the Sixth Amendment's guarantee of a public trial because they were conducted in "secrecy" (Pet. 11–16).

We think the first contention presents nothing new. In the *Brown* case counsel sought, on both of Brown's appearances before the court, "a reasonable adjournment and a notice from the Government of the specifications or charges for which we are having this hearing so that we can prepare for this hearing and

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conduct is a conclusive defense to a charge of contempt (see *United States* v. *Shipp*, 203 U.S. 563, 574) and the situation in *Brown*, and here, where the court foregoes proceeding against a witness under Rule 42(b) for his contempt before the grand jury, but outside of the actual presence of the court, and elects instead to make another effort to induce him to testify before the court with the grand jury present. As this Court explained, such procedure affords the witness "a *locus penitentiae*" (359 U.S. at 52)—an opportunity to purge himself of contempt (not the same thing as "purgation by oath")—before he is finally adjudicated in contempt.

The petitioner also argues (Pet. 23–27) that in holding that Brown's final refusal to answer the questions "left the [district] court no choice" but to adjudicate him in contempt (359 U.S. at 51), this Court "overlooked" the district court's power to commit him for civil contempt until he complied with the court's order. Apart from the unworthiness of this argument, especially in the light of the cases this Court cited (some of which, as the petitioner points out, were instances of the use of the coercive power and therefore, in his view, do not support the Court's conclusion), the short answer to it is that it is not for the witness to dictate which, among the remedies available, the court shall choose to deal with his recalcitrance.

be able to properly represent our client" (Brown R. 9; see also *id.*, 10, 35, 37 and 46). In this case counsel refined his requests in this respect (R. 9, 37, 40) by adding that he wished to subpoena (1) "all the Grand Jury minutes of this investigation so that we can determine * * * whether this is in reality an investigation under the Motor Carriers' Act"; (2) "the Interstate Commerce Commission and the Justice Department" to the same end; and (3) the "minutes of the other Grand Juries before which this witness has appeared * * * so that it can be determined by the Court after examination of the minutes whether the immunity purported to be granted here is co-extensive with the privilege" (R. 9–10; see also R. 40).[*] The district court denied these requests on the ground of irrelevancy, ruling, as it had in the *Brown* case (Brown R. 34), that the proceeding involved no question of fact but only the legal issue whether the witness was protected by the immunity statute (R. 10, 11, 16, 26, 27, 35, 40, 42–43).

In the light of the *Brown* decision, these ancillary requests for process were properly denied. This Court there confirmed the district court's view that the proceeding involved no factual issue on which it was necessary to hear evidence. 359 U.S. at 48.

[*] In *Brown*, too, counsel argued in support of his motion for an adjournment that he wished to look into the question whether he could "compel the production of the grand jury minutes of prior investigations to ascertain the purpose of this investigation" (Brown R. 11). He also raised a question whether "this investigation was directed by the Interstate Commerce Commission [or] by the Attorney General" (*id.*, 30).

Furthermore, as the courts below rightly held (R. 16; Pet. App. 30–31), a witness before a grand jury has no right to probe into the purposes of its investigation or to challenge the motives of the jury or government counsel. *United States* v. *Johnson*, 319 U.S. 503, 513.

With respect to the petitioner's complaint of "secrecy", it is to be noted that, as in the *Brown* case (see 359 U.S. at 51, fn. 11), this question was raised for the first time in the court of appeals. It is true that the Court pretermitted this question in *Brown* because the record did not show that the proceeding was conducted in "secrecy" (*ibid.*), and that the record here does show that on the petitioner's second appearance before the court with the grand jury on April 22, 1957, at which time he persisted in his refusal to answer the questions and was adjudicated in contempt, the courtroom was "cleared" after the court explained, "Will those who have no other business in the courtroom please leave now? I have a Grand Jury proceeding" (R. 36–37). The petitioner made no objection.[3]

[3] It does not appear that the courtroom was cleared on the petitioner's first appearance before the court on April 18, 1957, when the grand jury asked the aid of the court in directing the petitioner to answer the grand jury's questions (compare Pet. 6 with R. 7 and R. 36). In any event, the petitioner would have no standing to complain if the courtroom was in fact cleared, because the proceedings on that day, which culminated only in a direction that the petitioner appear before the grand jury on April 22 and answer the questions (R. 35–36), could in no sense be considered a contempt proceeding. The contempt did not occur until April 22. See *Brown* v. *United States*, 359 U.S. at 49–50.

On this point, we reiterate the argument we made in our brief in the *Brown* case (pp. 48-50) that the petitioner cannot object to such procedure for the first time in an appellate court.[4] To the extent that the district court was continuing the grand jury inquiry on April 22, 1957, *i.e.*, asking the questions which the petitioner had previously been asked in the grand jury room, the closing of the courtroom would seem appropriate and consistent with the usual mode in which a grand jury operates. It should not be legally significant, in this regard, whether the court physically goes to the grand jury room or the grand jurors go to a courtroom from which the public is absent. The only respect in which the procedure here differed from that which might have prevailed had the court gone to the grand jury room is that the petitioner's counsel and some court attendants were present when the questions were put to the petitioner by the court.[5] But the petitioner can hardly object to

[4] The court of appeals, after dealing with the petitioner's contention that he was denied compulsory process, said that "He raises no other points of merit" (Pet. App. 30-31). On Brown's appeal, the court of appeals, apparently assuming that the courtroom was closed at the time Brown was adjudicated in contempt as it was on his earlier appearance before the district court, noted the presence of Brown's counsel and his failure to object to the clearing of the courtroom and held that Brown could not then complain of such procedure. 247 F. 2d 320, 330.

[5] It is to be noted that, when the court called the petitioner to the stand on April 22 to answer before the court and the grand jury the questions he had twice previously refused to answer in the grand jury room, the petitioner's counsel asked whether "this [is] the Grand Jury proceeding, or is this a contempt proceeding?" The court replied, "The Court and the

the presence of his counsel; his complaint is that the proceedings were too secret, not too public. And, in any event, the petitioner stated that he would persist in his refusal to answer the questions were he to return to the grand jury room (R. 50–51).

Here, unlike the situation of a contempt committed before a judge sitting as a one-man grand jury in secret session (cf. *In re Murchison*, 349 U.S. 133; *In re Oliver*, 333 U.S. 257)*, the petitioner's contempt in the presence of the court was committed in recorded proceedings at a time when he was represented by counsel. Up to this point the proceeding was essentially designed to afford the petitioner a further opportunity to comply with the court's direction that he answer the questions before the court faced the neces-

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Grand Jury." When counsel reiterated his request that "we proceed in accordance with Rule 42(b)", the court replied, "We are proceeding in accordance with Rule 42(a)." (R. 47.) This latter comment must necessarily be read to mean that the court *would* proceed under Rule 42(a) if the petitioner were to persist in his disobedience of the court's directions to answer the questions.

*On this point, the petitioner, like Brown (see Petitioner's Brief in No. 4, O.T. 1958, pp. 27–28, 30–31), relies principally on the *Oliver* decision. But surely the recorded adversary proceedings before the district court, in which the petitioner was capably and vigorously represented by counsel every step of the way, cannot be labeled "secret" in the sense of that word as it is used in the *Oliver* case, where the entire proceeding, from the time Oliver testified to the time the judge-grand jury summarily sentenced him for contempt for giving what the judge believed (on the basis of prior secret testimony given by another witness in Oliver's absence) was false and evasive testimony, was conducted in secrecy, with no opportunity for Oliver even to consult counsel.

sity of adjudicating him in contempt. *Brown* v. *United States*, 359 U.S. at 50, 51–52.

If the petitioner ever had a right to have the courtroom reopened to persons in addition to his counsel, that right could only have arisen after it finally became apparent on April 23 that, by virtue of his persistent refusal to testify, the inquiring function of the grand jury was thwarted and all that remained was the adjudication of contempt by the court. The petitioner not only failed to assert any such right, but he cannot in any manner, real or hypothetical, demonstrate that he was prejudiced by the procedures that followed. All that took place after the court stated that it would "listen to any reason why I should not so adjudicate this witness in contempt", as requested by counsel for the government after the petitioner's final refusal in the presence of the court and the grand jury to answer the questions (R. 51), was the reiteration by the petitioner's counsel of his contentions that the immunity provision did not extend to the petitioner and that the proceeding was not in accordance with Rule 42(b), and the court's adherence to its prior rulings (R. 51–52). The adjudication of contempt (R. 52) and the sentence thereafter imposed (R. 54), of course, immediately became matters of public record and there was no attempt on the part of the court or counsel for the government to conceal the proceedings. Since the courtroom session on April 23 was essentially a continuation of the grand jury's meeting and, as we have said, was therefore properly conducted in the absence of the general public, there was certainly no defect in the proceeding up to

that point. In these circumstances, and especially in the absence of any objection on this score, the petitioner was not prejudiced simply because the court did not then dissolve the closed session with the grand jury, que grand jury, and announce that the courtroom was open for the purpose of making the formal adjudication, which had clearly been foreshadowed (see footnote 5, pp. 6–7, *supra*), on the petitioner's refusal to obey the court's order in the closed session to answer the grand jury's questions. The petitioner would have been entitled to no more than this if he had objected to the clearing of the courtroom. Accordingly, if the procedure was defective, we submit that, at most, the petitioner would be entitled to a remand of the case to the district court for resentencing. But, as the court of appeals held in the *Brown* case, 247 F. 2d 332, 338–339, we think that even within this narrow compass, the petitioner's objection came too late.

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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AUGUST 1960.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 164

MORRY LEVINE,
Petitioner,

against

UNITED STATES OF AMERICA,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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IN THE

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PETITIONER'S REPLY BRIEF

I

Replying to Government's footnote 1 (Government Memorandum, p. 2).

In footnote 1 on page 2 of its Memorandum in Opposition the government asserts that there is no inconsistency between the discarding of "purgation by oath" consummated by this Court in *Clark* v. *United States*, 289 U. S. 1 (see *United States* v. *Shipp*, 203 U. S. 563), and the holding in *Brown* v. *United States*, 359 U. S. 41 (O. T. 1958 No. 4) that a witness who has refused to answer questions before a grand jury may purge himself of his completed contempt by appearing before the court and the grand jury and answering the questions.

The situation is quite to the contrary of the government's contention.

If, as held by this Court in the *Brown* case, *supra*, the recalcitrant grand jury witness does relieve himself of the contempt committed by him before the grand jury by testifying under oath before the judge-grand jury, then clearly there has been a purging of a completed contempt and thereafter there could be no prosecution under Rule 42(b) for the same.

Hence, the conflict between the *Brown* case and the *Clark* and *Shipp* cases, *supra*, is clear and direct.

II

Replying to Government's Memorandum, pages 5-9.

At pages 5 to 9 of its Memorandum in Opposition the government treats the question of the secrecy of the proceedings in this case.

It would seem that the government's purported answer to petitioner's contentions on the issue of secrecy is that since petitioner's counsel was present, the proceedings were not too secret. In discussing the *Oliver*[a] case in footnote 6 on page 7 of its Memorandum the government points out that at no stage of the proceedings before that judge-grand jury did Oliver have counsel and asserts that that is what made that proceeding too secret. The government cannot successfully equate the right to a public trial with the right to counsel. The allowance of counsel to a defendant cannot be the equivalent of a public trial nor can the converse be the equivalent of the allowance of counsel.

In fact, in *Tanksley* v. *United States*, 145 F. 2d 58, the Court of Appeals reversed because of the deprivation of

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a. 333 U. S. 257.

that defendant's right to a public trial. Defendant's counsel was, as the opinion shows, present in court along with relatives and the press. Although there was less secrecy in the *Tanksley* case, *supra*, than in the instant case, the Court of Appeals reversed the conviction.

Similarly in *Davis* v. *United States*, 247 Fed. 394, all spectators were cleared from the courtroom, except relatives, members of the bar, newspaper reporters and defendant's attorneys, but the Court of Appeals reversed and ordered a new trial.

As the Court of Appeals in the *Davis* case cogently pointed out, relatives, attorneys, witnesses or newspaper reporters are not "the exclusive representatives of the public." *A fortiori* the petitioner's counsel was not a representative of the public.

Hence, the mere presence of counsel throughout the proceeding did not and could not afford petitioner a public trial.

The government at pages 8 and 9 of its Memorandum in Opposition contends further that no consideration should be given to the question of secrecy, because no prejudice has been shown. But, it is fundamental that, where the right to a public trial has been denied, prejudice is presumed absolutely. *Davis* v. *United States*, 247 Fed. 394, 398; *Tanksley* v. *United States*, 145 F. 2d 58; *People* v. *Jelke*, 308 N. Y. 56.

The fact that no specific objection was made does not prevent consideration of the error. The right to a public trial is so fundamental that the infringement thereof cannot be overlooked on appeal or in this Court because of counsel's failure to raise it in the trial court, nor was there any conscious waiver, if there could be, by petitioner of his Constitutional right to a public trial. The record is clear, however, that counsel for petitioner throughout the

trial sought a hearing on notice under Rule 42(b), which could only mean an open trial.

The government in its effort to show that no prejudice resulted to petitioner by reason of the secrecy of the proceedings (although, as pointed out above, prejudice is presumed) advances the proposition that the only phase of the proceedings on April 22, 1957, the day of petitioner's conviction for contempt, required to be public was the formal adjudication and sentence.

This again is the nice distinction attempted to be made between the purported efforts to obtain testimony from petitioner through the assistance of the trial court and the adjudication of contempt under Rule 42(a).

That distinction has no relationship to the reality of what transpired. The government, indeed, is aware of this point, because in an effort to preserve this putative distinction it in its Memorandum seeks to translate very clear, unambiguous, contrary language of the trial court. When on April 22, 1957 the court called petitioner to the stand (47-a) to put the questions to him and direct him to answer, it stated to petitioner's counsel that "we are proceeding in accordance with Rule 42(a)."

This statement the government in footnote 5 of its memorandum on page 7 translates to mean "that the court *would* proceed under Rule 42(a) if the petitioner were to persist in his disobedience of the court's directions to answer its questions". (Emphasis in original.)

No restatement of the court's language that it was proceeding under Rule 42(a) can avoid the fact that it considered that the proceedings about to be conducted by it were in substance and effect contempt proceedings.

It was, at the very least, if not earlier, when petitioner was called to the stand (46-a), that he was in jeopardy and that his right to an open hearing, as well as to all

the other rights of a defendant in a criminal contempt cause, accrued.

At that point the court knew that petitioner had despite its direction continued his refusal to answer before the grand jury and, as the government says (Memo., p. 9) "the formal adjudication • • • had clearly been foreshadowed • • •".

Whether it was, as the court described it, a proceeding under Rule 42(a) or as the Court of Appeals in the *Brown* case[b] described it, a proceeding ancillary to the grand jury, or as this Court considered it in the *Brown* case, *supra*, a continuation of the grand jury proceeding, the fact is that the entire proceedings on April 22, 1957 were in effect a trial because petitioner was in jeopardy of his liberty and in that event was entitled to have it conducted publicly.

The government's contention that the right to a public trial could only have accrued at the time of adjudication is contrary to reason and justice. It would reduce this right in this type of contempt case to an absurdity and a meaningless gesture. If the right to a public trial has a social purpose and function, then it is the proceedings which lead up to the adjudication or conviction whether of contempt or of any other crime which require the admission of the public. Certainly in a trial of a crime other than contempt no one would attempt to assert that the formal adjudication or conviction by the judge of a defendant was all that was required to be public.

In effect in this proceeding prior to the adjudication, the court was ascertaining the facts upon which it would make its determination whether it should adjudicate petitioner in contempt. The trial was all that went before the actual adjudication and the opening of these prior

b. 247 F. 2d 332.

proceedings to the public was essential to constitute it a valid and constitutional proceeding.

The secrecy here present so tainted the proceedings as to require a reversal.

III

The government contends that there were no issues of fact in this case on which it was necessary to hear evidence as otherwise it would be an intrusion into the purposes and motives of the grand jury or government counsel.

The preclusion of petitioner from demonstrating extenuating circumstances and, in view of the disparity between the offense under investigation and the punishment meted out, the failure of the government to present, and the refusal of the court to permit petitioner to obtain, any proof to show the purpose and significance of the grand jury investigation, the petitioner's relationship to the subject matter under investigation and the effect of his recalcitrance on the future of the investigation—in short, the deprivation of a trial—is not justified by this argument by the government, conventional though it may be. *Brown* v. *United States,* O. T. 1958, No. 4, dissenting op., pp. 4, 5. See concurring opinion of Frank, C.J., *United States* v. *Scully,* 225 F. 2d 113, 116-118.

And in the court below these very issues were sought by petitioner's counsel to be tried out. (40-a—42-a. See 53-a, 54-a.)

IV

Conclusion.

The denial of due process to the petitioner in the proceedings here and the failure to follow Rule 42(b) and the secrecy imposed on these proceedings and all the reasons set forth in the petition herein require the review of petitioner's conviction for criminal contempt for which purpose a writ of certiorari should be issued.

Respectfully submitted,

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ON WRIT OF CERTIORARI

THE UNITED STATES

COURT OF APPEALS

FOR THE SECOND

CIRCUIT

IN THE

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OCTOBER TERM, 1959

No. 164

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UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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CITATIONS

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No. 164

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner's Brief

Certiorari has been granted to review petitioner's conviction for criminal contempt in refusing to answer certain questions in a grand jury inquiry (R. 48). Petitioner was sentenced to one (1) year imprisonment (R. 45). The Court of Appeals for the Second Circuit affirmed (R. 45-47). Petitioner is enlarged on bail (R. 45). The Court of Appeals stayed its mandate (R. 47).

Opinion Below

The *per curiam* opinion of the Court of Appeals (R. 45) is reported at 267 F. 2d 335. The District Court's decision (R. 29) is not officially printed.

Jurisdiction

The judgment of the Court of Appeals was dated and entered on June 2, 1959 (R. 47). Jurisdiction to review

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838456—60——1

CITATIONS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 45–46) is reported at 267 F. 2d 335.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1959 (R. 47). The petition for a writ of certiorari was filed on July 1, 1959, and was granted on October 19, 1959 (R. 48). 361 U.S. 860. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The order granting the writ of certiorari (R. 48, 361 U.S. 860) limited the questions for consideration by the Court to Questions No. 1 and No. 2 presented by the petition. These questions are:

1. Whether the secrecy of the proceedings, including the adjudication and sentence for contempt under Rule 42(a) of the Federal Rules of Criminal Procedure, deprived petitioner of Due Process of Law in violation of the Fifth Amendment to the United States Constitution.

2. Whether the secrecy of the proceedings and of the adjudication and sentence of petitioner for criminal contempt under Rule 42(a) of the Federal Rules of Criminal Procedure deprived petitioner of a public trial as required by the Sixth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS, STATUTE, AND RULE INVOLVED

The Fifth Amendment provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *.

18 U.S.C. 401(3) provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> * * * * * *
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42(a) of the Federal Rules of Criminal Procedure provides:

RULE 42. CRIMINAL CONTEMPT

(a) *Summary Disposition.*

A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

STATEMENT

On April 22, 1957, in the United States District Court for the Southern District of New York, Judge Richard H. Levet, acting under the authority of 18 U.S.C. 401(3), *supra*, and in accordance with Rule 42(a) of the Federal Rules of Criminal Procedure, *supra*, summarily adjudged petitioner in contempt of court for refusing, in the actual presence of the court, to obey an order of the court directing him to answer certain questions as a witness before a grand jury (R. 2–5, 39–43). Petitioner was sentenced to one year's imprisonment (R. 45). On appeal, the judgment of conviction was affirmed (R. 45–47).

The circumstances leading to the contempt judgment—which are briefly noted in the order of contempt (R. 2–3) and Judge Levet's certificate under Rule 42(a) (R. 3–5), and which, with one possible exception (see fn. 6, *infra*, p. 6), were identical in all material respects with those culminating in the

contempt judgment sustained in *Brown* v. *United States*, 359 U.S. 41[1]—were as follows:

On April 18, 1957, petitioner appeared pursuant to subpoena to testify as a witness before a grand jury for the Southern District of New York, which was engaged in investigating possible violations of Part II (the motor carrier provisions) of the Interstate Commerce Act, 49 U.S.C. 301, *et seq.* (R. 4, 5, 10, 16, 17). After being sworn and answering a few preliminary questions (R. 14–16), petitioner refused to answer a series of six questions on the ground that to do so might tend to incriminate him (R. 16–20).[2] He persisted in this refusal after being advised by the government attorney that the applicable statutes (see *Brown* v. *United States*, *supra*, 359 U.S. at 44–47) afforded petitioner complete immunity from prosecution as to any matter concerning which he might testify and that therefore he had no privilege against self-incrimination "before this Grand Jury in this inquiry" (R. 17–18).[3]

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[1] This case and *Brown* arose out of the same grand jury investigation, and involved the same judge and same counsel on both sides (R. 5–6; Brown R. [No. 4, Oct. Term, 1958] 6–7). The same questions were put to both witnesses in identical language (R. 4–5; Brown R. 5), and the procedure followed in the two cases was the same (cf. R. 3–5 with 359 U.S. at 42–44). Petitioner's grand jury appearance and the contempt conviction which grew out of it occurred approximately two weeks after the appearance and conviction of Brown (R. 2–5, 18; Brown R. 3–5).

[2] The subject matter of the questions, which are set forth in the contempt certificate (R. 4–5), has no present relevance.

[3] Petitioner's counsel was present in an anteroom adjoining the grand jury room throughout the questioning; petitioner was free to consult with him at any time during his interrogation, and on several occasions did so (R. 14, 16–17, 18).

Some time later on the same day, April 18, 1957, the grand jury and the government attorney appeared before Judge Levet in one of the regular courtrooms to request "the aid and assistance of the Court" in compelling petitioner to testify (R. 5). Petitioner and his counsel were also present (R 5–29).[4] After informing himself of what had transpired in the grand jury room by hearing the grand jury reporters read their stenographic notes (R. 13–21), and after hearing argument on various legal questions, including the scope of the immunity afforded a grand jury witness under the applicable statutes (R. 6–13, 21–18), the judge concluded on the basis of "all the facts and upon all the record" that the immunity granted by the pertinent statutes was as extensive as the constitutional privilege on which petitioner relied (R. 29). The judge accordingly ruled that petitioner "must answer" the questions and ordered him to appear before the grand jury on the following Monday, April 22, 1957, for that purpose (*ibid.*).

On Monday, April 22, 1957, petitioner again appeared before the grand jury and again refused to

[4] Petitioner states (though there is nothing in the record on the subject) that "[t]he courtroom was cleared" for these April 18th proceedings (Br. 4)—as it concededly was for the subsequent proceedings of April 22d (see *infra*, p. 6). Whatever the actual situation may have been in regard to the public or non-public character of the April 18th proceedings is in any event immaterial, since those proceedings, which culminated only in a direction by the judge to petitioner to appear before the grand jury on April 22d and answer the questions, could in no sense be considered a contempt proceeding. The contempt did not occur until April 22d. See *Brown* v. *United States*, *supra*, 359 U.S. at 49–50.

answer the questions (R. 30, 37–38).[5] Later on the same day, the grand jury and government counsel again appeared before Judge Levet to request "the assistance of the Court in regard to the witness Morry Levine" (R. 30). Petitioner and his counsel were also present (R. 30–45). The record indicates that at the beginning of these proceedings the following occurred (*ibid.*):

> The Court. Will those who have no other business in the courtroom please leave now? I have a Grand Jury proceeding.
>
> The Clerk: The Marshal will clear the court room.
>
> (Court room cleared by the Marshals.)[6]

Petitioner's counsel remained in the courtroom, however, and was present (together with petitioner, government counsel, the grand jury, and the court reporter) throughout the immediately ensuing proceedings, which

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[5] As on the occasion of petitioner's previous appearance before the grand jury (see fn. 3, *supra*, p. 4), his counsel was present in an anteroom, available for consultation at any time (R. 36–37). On this second occasion, as previously, petitioner based his refusals to answer on the privilege against self-incrimination (R. 37–38).

[6] This clearing of the courtroom is the only pertinent respect in which the proceedings in this case may have differed from those involved in *Brown v. United States*, *supra*, 359 U.S. 41. The *Brown* record did not indicate whether the courtroom was cleared on the occasion of the proceedings during which Brown was adjudicated in contempt (see Brief for the United States, No. 4, Oct. Term, 1958, pp. 46–48). This Court, accordingly, did not discuss in *Brown* the "claim, first advanced in the Court of Appeals, that the District Court proceeding was conducted in 'secrecy'" (359 U.S. at 51, n. 11).

culminated in the adjudication and sentencing of petitioner for contempt (R. 30–45).[7]

Petitioner's counsel requested the court to "follow the requirements of" Rule 42(b) of the Federal Rules of Criminal Procedure, *i.e.*, to proceed in accordance with the "notice and hearing" provisions of that Rule to try petitioner as for a completed contempt before the grand jury (R. 30–32). Government counsel, opposing this request, asked that the court follow the same procedure as had been followed in the *Brown* case (see 359 U.S. at 43, 47–52), *i.e.*, instead of proceeding to punish petitioner's "consummated contempt" in the grand jury room, to give him "another chance" to answer the questions, this time in the "physical presence of this Court," to be followed by punishment "for contempt under Rule 42(a)" should he persist in the court's presence to disobey the court's order (R. 32–33). The judge indicated that he would follow the latter procedure (R. 33; see R. 39).

After hearing further legal argument by petitioner's counsel (R. 33–36), and being apprised of petitioner's refusal of that morning to answer before the grand jury the questions which he had been ordered by the court to answer (R. 36–38), the judge directed petitioner to take the stand, reminding him that he was "still under oath" (R. 38–39). In response to a question by petitioner's counsel at this point as to whether "this proceeding now" was "the Grand Jury proceeding" or "a con-

[7] Whether the clerk, the marshal or marshals, and other court attendants (if any), or any of these, were present during these proceedings does not appear. The question is immaterial in the view we take of the case.

tempt proceeding", the judge replied, "The Court and the Grand Jury" (R. 39). Counsel said he "object[ed] to any such procedure" and again asked the court to proceed "in accordance with Rule 42(b)" (*ibid.*). The judge replied (*ibid.*): "We are proceeding in accordance with Rule 42(a)." The judge thereupon propounded each question to petitioner, with the direction that he answer (R. 39–41). Petitioner again refused to answer (*ibid.*), and stated, in response to a further question by the judge, that he would continue to refuse to answer if he were again taken to the grand jury room and asked the questions (R. 42).

The judge thereupon excused petitioner from the stand and stated that he would "listen to any reason why" he should not "adjudicate this witness in contempt" pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure for a contempt—disobedience of a lawful order—committed in the physical presence of the court (R. 42–43). Petitioner's counsel replied that there were "several reasons" why the judge should not do so, and proceeded to renew various arguments which had previously been heard by the court and rejected (R. 43).[1] He did not, how-

[1] Petitioner's counsel had earlier argued (R. 30–32, 39; see *supra*, p. 7) that petitioner was entitled to be proceeded against, if at all, pursuant to the notice and hearing provisions of Rule 42(b) as for a completed contempt occurring in the grand jury room and so not in the actual presence of the court (cf. *Brown* v. *United States*, *supra*, 359 U.S. at 47–52, where this Court rejected a like argument by Brown); and he renewed this argument at this time (R. 43). In addition, he again pressed his contention that the scope of the immunity afforded by the applicable statutes was less broad than the

ever, mention or suggest (nor did anyone) as a reason why the judge should not forthwith pronounce judgment the fact that the judge's earlier order to clear the courtroom was still in effect, nor did anyone present request or suggest that that order be rescinded prior to the making of the contempt adjudication. The judge thereupon pronounced judgment of contempt (R. 43) and (after hearing counsel on the question of an appropriate sentence (R. 43–45)) sentenced petitioner to a year's imprisonment (R. 45).

The order of contempt (R. 2–3) and the certificate under Rule 42(a) (R. 3–5) were entered the following day, April 23, 1957. Petitioner's complaint concerning the "secrecy" of the proceedings during which the judgment and sentence were pronounced was made for the first time (like the similar complaint in the *Brown* case, see 359 U.S. at 51, n. 11) in the court of appeals.

SUMMARY OF ARGUMENT

The adjudication of petitioner in criminal contempt while the order excluding the general public from the courtroom for the grand jury proceeding was still in effect did not infringe any of petitioner's rights or prejudice him.

A. Petitioner's contempt was properly adjudicable summarily under Rule 42(a) of the Federal Rules of Criminal Procedure. *Brown* v. *United States*, 359 U.S. 41, 47–52. The essence of a summary adjudication is that no trial or hearing is required because

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constitutional privilege which petitioner had asserted, and he invoked by reference "all the other reasons stated by me during the course of this proceeding" (*ibid.*).

such judgment by certiorari is conferred on this Court by § 1254, Title 28, U. S. C. and is invoked pursuant thereto and Rule 37(b), Federal Rules of Criminal Procedure.

Questions Presented for Review

1. Whether the secrecy of the proceedings, including the adjudication and sentence for contempt under Rule 42(a) of the Federal Rules of Criminal Procedure, deprived petitioner of Due Process of Law in violation of the Fifth Amendment to the United States Constitution.

2. Whether the secrecy of the proceedings and of the adjudication and sentence of petitioner for criminal contempt under Rule 42(a) of the Federal Rules of Criminal Procedure deprived petitioner of a public trial as required by the Sixth Amendment to the United States Constitution.

Constitutional Provisions, Statutes and Regulations Involved

The pertinent constitutional provisions, statutes and regulations being lengthy are set forth as an appendix to this petition, *infra*, p. 22; their citations are: *United States Constitution*, Amendments V and VI: *Federal Rules of Criminal Procedure*, Rules 42(a) and (b), Title 18, U.S.C.

Statement of the Case

Petitioner (as was Emanuel Brown, 359 U. S. 41) is a principal of Young Tempo, Inc., a New York City dress manufacturer. T. & R. Trucking Company transported dresses between Young Tempo, Inc. in New York and Acme Dress Company in Midvale, New Jersey.

John Dioguardi (according to the government's information) is the actual, and one Rij the nominal, owner of the trucking company. In the Southern District of New York grand juries are conducting investigations of

racketeering and of the Riesel obstruction of justice case. Dioguardi, Rij and, possibly, others are the subjects of these investigations (R. 34, 35).

Petitioner under subpoena made numerous appearances before these grand juries (R. 26, 27). There petitioner was told by the prosecutor that he was to be indicted (R. 8, 26, 27).

In March, 1957 the prosecutor told petitioner's counsel that an investigation under the Motor Carriers Act was to be instituted, that petitioner would be subpoenaed to appear before the grand jury and that, since the immunity statute in the Interstate Commerce Act would apply, he could not interpose the Fifth Amendment plea (R. 12, 17).

Petitioner was then served with a subpoena requiring his appearance before the April, 1957 grand jury "to testify * * * in regard to an alleged violation of Sections 309, 322, Title 49 United States Code" (R. 15, 16). Petitioner appeared.

His counsel being present in the anteroom, petitioner was advised that he could consult with his attorney (R. 14, 15).

Petitioner was asked (R. 16): "* * * are you associated with Young Tempo, Inc.?" Petitioner requested leave to consult his attorney (R. 16). After such consultation, petitioner returned to the grand jury room and refused to answer the question on the ground of possible self-incrimination (R. 17).

The prosecutor then advised petitioner that the investigation was into possible violations of the Motor Carriers Act, that Section 305(d), Title 49, U. S. C., gave full immunity to any witness compelled to testify as to any matter arising under that Act and that petitioner could not plead the Fifth Amendment in this inquiry (R. 17, 18).

The foreman then directed petitioner to answer the question asked by the prosecutor. Petitioner repeated his

refusal to answer on the ground of possible self-incrimination (R. 18, 19).

After consulting with counsel, petitioner once more refused to answer the question on the same ground (R. 18, 19). Thereafter five more questions were put to petitioner by the prosecutor, all of which petitioner refused to answer on the ground of possible self-incrimination (R. 19, 20).[1]

After petitioner's refusal to answer the grand jury, prosecutor and petitioner and his counsel proceeded to District Judge Levet's courtroom (R. 5, 6).

The prosecutor there outlined the procedure requested by the government to be followed. For the grand jury he asked the court's aid in a direction to petitioner to answer the questions (R. 5, 6). The courtroom was cleared.

The prosecutor requested (R. 6) that the court proceed as in the case of *Emanuel Brown* v. *United States*, then on appeal to the Court of Appeals and subsequently decided by this Court (359 U. S. 41).

That procedure was, as outlined by the prosecutor, a preliminary determination by the court as to whether the witness had to answer the questions and, if so, a direction that he answer the questions, the return of the witness to the grand jury room and upon his further refusal there to answer the questions, the return of the grand jury to the court with a second request that the same questions be put by the court to the witness and, if the witness then

1. The questions which petitioner refused to answer are:
"* * * are you associated with Young Tempo, Inc.? (R. 16) * * * does Young Tempo, Inc. use a trucking company known as * * * the T. & R. Trucking Co.? * * * who do you know to be the owner or owners or the principal in interest or principals in interest of * * * the T. & R. Trucking Company? (R. 19) * * * are you associated with Acme Dress Co. in Midvale, New Jersey? * * * does the T. & R. Trucking Co. provide trucking services between Young Tempo, Inc. in New York City and the Acme Dress Co. in Midvale, New Jersey? * * * do you know if the T. & R. Trucking Co. * * * has applied for or obtained a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, New York and Midvale, New Jersey?" (R. 20)

refused to answer, the government would ask that he be held summarily in contempt pursuant to Rule 42(a), Federal Rules of Criminal Procedure.

Petitioner's counsel requested (R. 6, 7) an adjournment, notice under Rule 42(b), Federal Rules of Criminal Procedure, a specification of charges and an opportunity to prepare for trial. Petitioner's counsel also requested compulsory process to require the production and attendance of witnesses, so that the issues of fact could be met (R. 6, 7). The court denied petitioner's motions (R. 8-13).

The grand jury stenographers then read their minutes of the grand jury proceedings (R. 13, 14, *et seq.*). Thereupon petitioner's counsel renewed his prior motions and applications, which were again denied (R. 21-23).

After argument (R. 23, *et seq.*) on the applicability of the immunity statute [Title 49, U.S.C. §305(d)], the court rendered its decision (R. 29). As in the case of *Emanuel Brown, supra,* it concluded that there was immunity, and that petitioner had to answer, and, therefore, directed him to answer the questions put to him before the Grand Jury.

The court then recessed the grand jury until April 22, 1957 at 10:30 A.M. with a direction to petitioner to attend (R. 29).

Petitioner returned to the grand jury room at the time appointed. The prosecutor put to him the six questions directed to be answered (R. 36-38), which petitioner refused to answer on the claim of possible self-incrimination.

The grand jury, petitioner and counsel then returned to the courtroom of District Judge Levet (R. 30).

The courtroom was cleared at the direction of the court (R. 30) and the proceedings were thenceforth held in secret.

At that time the prosecutor stated to the court that "the April 1957 regular Grand Jury once again requested

the assistance of the court in regard to the witness Morry Levine [petitioner]" (R. 30).

Application was then made by petitioner's counsel that the court follow Rule 42(b), Federal Rules of Criminal Procedure, and Due Process and that he be furnished with notice of the charges and an opportunity to prepare and to frame his defenses to the charges (R. 30-35). The court overruled the application (R. 32-35).

Petitioner's counsel also requested an adjournment to obtain compulsory process and subpoena witnesses and renewed all the motions and applications which he had made at the prior session (R. 32-35). These motions and applications were overruled by the court (R. 32-35).

The grand jury stenographer read her minutes (R. 36, *et seq.*), which disclosed that petitioner had once more refused before the grand jury to answer the six questions on the ground of possible self-incrimination.

The prosecutor then requested that the court put to petitioner the questions declined by him to be answered and direct him to answer (R. 38). Over his counsel's objection the court ordered petitioner to take the stand in the courtroom (R. 38).

The court did not swear petitioner, but stated that he was "still under oath • • • with respect to what is said here, and with respect to any testimony • • •" (R. 39).

On inquiry by petitioner's counsel as to whether the proceeding was "the grand jury proceeding", or "a contempt proceeding" the court stated that it was "the Court and the Grand Jury" and that it was a "proceeding in accordance with Rule 42(a)" (R. 39).

Petitioner's counsel objected to the procedure, requested that the court proceed in accordance with Rule 42(b) and excepted to petitioner's "being put on the stand in a proceeding in which he is in jeopardy and which involves the possibility of a criminal contempt and being required

to testify in a proceeding in which he is in jeopardy in violation of his constitutional rights" (R. 39). The court overruled the applications and objections (R. 39).

The court then put to petitioner the same questions (*supra*, p. 4), over the objection of his counsel to each question and to each direction (R. 39-42). As to each such question petitioner refused to answer on the ground of possible self-incrimination (R. 39-42).

The court at the prosecutor's request inquired of petitioner whether, if he returned to the grand jury room, he would still decline to answer (R. 42). The court overruled counsel's objection to this question and petitioner answered that he "must decline to answer these questions • • • on the ground that they may tend to incriminate him • • •" (R. 42).

The prosecutor then asked the court to "adjudicate" petitioner "in contempt of this court for a violation of the lawful order and direction of the court • • • for a contempt committed in the physical presence of the Judge" (R. 42).

After listening to petitioner's counsel's reasons (R. 42, 43) why petitioner should not be adjudicated in contempt, the court stated that by reason of petitioner's conduct and failure to answer he was forced to adjudicate him in contempt (R. 43).

Government counsel was then heard on the question of sentence (R. 43, 44).

After hearing petitioner's counsel on the quantum of sentence, the court sentenced petitioner to be confined for a period of one year and admitted him to bail pending appeal (R. 44, 45).

SUMMARY OF ARGUMENT

The proceedings culminating in petitioner's conviction for criminal contempt for refusing to answer before the court and grand jury the questions which he had refused to answer before the grand jury, although directed so to do by the court, were secret throughout. Under *Re Oliver*, 333 U. S. 257, the secret proceedings here were violative of Due Process and of petitioner's right to a public trial under the Sixth Amendment to the United States Constitution. This is so, even though the *Oliver* case arose in a State court and was decided by this Court under the Fourteenth Amendment. A recalcitrant Federal grand jury witness cannot have less rights or protection than a State grand jury witness.

That petitioner was a grand jury witness should not affect his right to a public trial. The secrecy of the grand jury proceeding yields to the supervening interest in the protection of the constitutional right to a public trial and adherence to Due Process.

This case poses for this Court the question of the establishment of a basic rule as to the rights of a Federal recalcitrant grand jury witness, especially with respect to a public proceeding, since other rights normally accorded to defendants in criminal prosecutions, such as jury trial and notice and specification of charges, have been held not to apply to such persons.

The presence of petitioner's counsel throughout the secret courtroom proceedings did not convert the same into a public hearing or trial. The right to a public trial under the Sixth Amendment and the requirements of Due Process is independent of that to counsel and the satisfaction of any putative right of a recalcitrant grand jury witness to counsel in a summary contempt proceeding does not make the proceedings, as here, public. Indeed,

it would not have been sufficient if, in addition to counsel, relatives, newspaper men and members of the Bar were also present. The opening of the doors of the courtroom for the admittance of spectators was necessary to constitute this proceeding public.

Nor was the petitioner's right to a public trial waived, although no objection to the clearing of the courtroom and the secrecy of the proceedings was taken by petitioner or his counsel. Consequently this Court is not precluded from considering the matter. The right to a public trial under the Sixth Amendment and Due Process cannot be waived by non-objection. There must be an express conscious surrender of the right to make such waiver effective. The standards set by this Court for the effective waiver of the constitutional rights to jury trial and the assistance of counsel apply with equal force to the waiver of the right to a public trial. There is absent here such express conscious waiver by petitioner and his counsel.

Since petitioner was deprived of his right to a public trial, prejudice to him is presumed and he is not required to make any such showing.

An important question in this case is when petitioner's right to a public hearing accrued. Since petitioner's jeopardy attached at least at the time when he was ordered by the court to take the stand in the judge-grand jury proceeding in the courtroom, his right to a public hearing necessarily accrued no later than that point. As described by the District Court, the proceeding then became one under Rule 42(a), Federal Rules of Criminal Procedure, and it was, thus, converted from an inquisitorial to a punitive function. It was at least then that the doors of the courtroom had to be opened to the public.

An assertion that the right to a public proceeding accrued only at the time of adjudication and conviction for

contempt is contrary to reason and justice and would reduce this right in this type of contempt case to an absurdity and a meaningless gesture, especially where the alleged contempt did not occur in open court.

In any event, the Court's power to punish for contumacious conduct committed in its face and presence is limited to such occurrences which take place in open court. Conviction and punishment without notice and charges is Due Process in only one type of case, namely, contumacious conduct in open court in the presence of the Court. In every other case Due Process requires notice, charges and hearing.

Here the alleged contumacious conduct did not occur in open court but in secret proceedings. Under Due Process the lower court had no jurisdiction to adjudicate and convict petitioner summarily without notice, charges and hearing. Having done so, petitioner has been deprived of Due Process under the Fifth Amendment to the United States Constitution.

ARGUMENT

I.

The secrecy of the proceedings culminating in petitioner's conviction for criminal contempt requires a reversal under the Sixth Amendment to the United States Constitution and Due Process of law.

The record in this case is clear that the proceedings throughout were secret (R. 30).[2] Although the alleged contempt was not committed in open court, petitioner was in the same secret session convicted of criminal contempt therefor.

This case is squarely within the holding in *Re Oliver*, 333 U. S. 257. In contravention of that decision the court proceedings leading to the summary conviction for criminal contempt and the actual adjudication and sentence of petitioner were held *in camera*.

The factual situation in this case is particularly apposite to that in the *Oliver* case, *supra*. In that case, a Michigan Circuit Judge sat as a one man grand jury, constituting in one person a "Judge-Grand Jury" and this entity put the questions to the witness and upon his contumacious conduct before it held the witness guilty of criminal contempt and sentenced him to jail—all this in secret!

In this case a Federal grand jury and the Judge were converted into a "Judge-Grand Jury" and in secret, this entity (R. 39) put the questions to petitioner and on his refusal to answer held petitioner—likewise *in camera*—in contempt and sentenced him to jail.

Indeed, the District Court, on being asked, when it ordered petitioner to the stand in the courtroom, "What

2. In *Brown* v. *United States*, 359 U.S. 41, a companion to this case, this Court did not consider that petitioner's claim that the proceeding in the District Court was conducted in secrecy, because of the state of the record.

is this proceeding now? Is this the Grand Jury proceeding, or is it a contempt proceeding?", replied "The Court and the Grand Jury" (R. 39).

The secrecy of such proceedings was condemned by this Court in the *Oliver* case, *supra*. Mr. Justice Black there clearly pointed out the reasons why the requirements of grand jury secrecy cannot apply to contempt proceedings for a witness's misbehavior before the grand jury.

Mr. Justice Black said at page 264:

> "• • • Grand juries may examine witnesses in secret sessions. • • • Many reasons have been advanced to support grand jury secrecy. • • • But those reasons have never been thought to justify secrecy in the trial of an accused charged with violation of law for which he may be fined or sent to jail. Grand juries investigate. • • • They do not try and they do not convict. They render no judgment. • • • Nor may he [the defendant] be fined or sentenced to jail until he has been tried and convicted after having been afforded the procedural safeguards required by due process of law. ***Even when witnesses before grand juries refuse to answer proper questions, the grand juries do not adjudge the witnesses guilty of contempt of court in secret or in public or at all. Witnesses who refuse to testify before grand juries are tried on contempt charges before judges sitting in open court. • • • the due process clause may apply with one effect on the judge's grand jury investigation, but with quite a different effect when the judge-grand jury suddenly makes a witness before it a defendant in a contempt case.***
>
> "Here we are concerned, ***not with petitioner's rights as a witness in a secret grand jury session,*** but with his rights as a defendant in a contempt proceeding. The powers of the judge-grand jury who tried and convicted him in secret • • • must likewise be measured • • • by the constitutional

> stand' ls applicable to court proceedings in which an ac sed may be sentenced to fine or imprisonment or h .." [Emphasis supplied.]

The i' osition of secrecy in this proceeding also violated th Sixth Amendment to the United States Constitution w' ch guarantees a public trial in all criminal prosecutions.

This Court has held that in proceedings which result in a judgment of criminal contempt, the defendant is entitled to the rights accorded to defendants in criminal cases. *Cammer* v. *United States*, 350 U. S. 399, 403; *Re Michael*, 326 U. S. 224; *Nye* v. *United States*, 313 U. S. 33; *Michaelson* v. *United States*, 266 U. S. 42, 66; *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418, 444.

The defendant in a criminal contempt case should also be held to be entitled to the guarantee of a public trial.[3]

The rationale of the requirement of a public trial is grounded on firm principles—adherence to which has always been thought to be vital to a free democratic society.

As pointed out by Mr. Justice Black in the *Oliver* case, *supra*, page 268:

> **"The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the lettre de cachet. All of these institutions obviously symbolized a menace to liberty. In the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right**

3. *Compare:* Frankfurter and Greene, *The Labor Injunction*, 226—"Since a charge of criminal contempt is essentially an accusation of crime, all the constitutional safeguards available to an accused in a criminal trial should be extended to prosecutions for such contempt." See *Gompers* v. *United States*, 233 U.S. 604, 610, 611, Holmes, J.

> of an accused to a fair trial. Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."

This Court heretofore has not decided the applicability of the constitutional mandate for a public trial in criminal cases to Federal summary proceedings for contempt, and more particularly, against a recalcitrant grand jury witness.

The answer to that problem is, however, directly given in *Re Oliver*, 333 U.S. 257. While that was a State summary contempt case in origin and decided under the Due Process clause of the Fourteenth Amendment, there can hardly be any question that it applies to a Federal summary contempt proceeding against a recalcitrant grand jury witness. If this were not so, it would mean that under the Fourteenth Amendment defendants in State summary contempt proceedings have greater rights than persons similarly situated in the Federal courts under the Fifth Amendment Due Process provision and the Sixth Amendment requirement of a public trial. See also VI, p. 20, *et seq.*, *infra*.

The fact that petitioner was a grand jury witness cannot affect his right to a public trial.[4] *Re Oliver*, *supra*.

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4. Examples of Federal contempt proceedings against recalcitrant grand jury witnesses conducted in open court are: *United States* v. *Hoffman*, 185 F. 2d 617 (C.A. 3) [341 U.S. 479]; *Powell* v. *United States*, 226 F. 2d 269 (App. D.C.) [Appendix to Appellant's Brief in Court of Appeals, p. 88, fol. 100]; *United States* v. *Trumb*, 232 F. 2d 43 (App. D.C.) [Joint Appendix in Court of Appeals, p. 28, fol. 321]; *Rogers* v. *United States*, 340 U.S. 367. *Curcio* v. *United States*, 354 U.S. 118.

Examples of State court contempt proceedings in open court against recalcitrant grand jury witnesses are: *Ex parte Gould*, 60 Texas Cr. 442; *State* v. *Judge*, 32 La. Ann. 1222; *People* v. *Kelly*, 24 N.Y. 74.

Indeed, even if it could be said that requiring publicity for proceedings such as these involving a grand jury investigation may impair the investigative powers of the inquest, the choice must be made in favor of Due Process and fair play as against secret inquisition. [This Court made a comparable choice in *Jencks* v. *United States*, 353 U.S. 657. See *United States* v. *Andolschek*, 142 F. 2d 503 (C.A. 2).]

Moreover, Rule 6(e), Federal Rules of Criminal Procedure, recognizes the possible breach of grand jury secrecy in the interest of justice in a judicial proceeding. The protection of a defendant's constitutional right to a public trial is undeniably in the interest of justice. Unquestionably the proceeding here was judicial.

The necessity of restraint upon the judiciary based upon other than their self-control has been recognized by this Court. The most potent force in this regard is publicity, because, as was said, in the *Oliver* case (p. 270), the "knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."[5]

This Court is, thus, faced with a fundamental question, that is, the extent to which the exercise of the summary contempt power of the Federal courts against recalcitrant grand jury witnesses is subject to constitutional safeguards established to protect an accused in a criminal case.

The erosion of the constitutional rights of this and other criminal contempt defendants proceeds apace. Thus he has no right to trial by jury. *Green* v. *United States*, 356 U. S. 165. If he is a recalcitrant grand jury witness, he may be compelled to take the stand and is not entitled to notice, specification of charges and a hearing. *Brown* v.

5. It is also a necessary restraint upon the Executive branch, for otherwise, a witness pressed into an immediate appearance before a grand jury by a "forthwith" subpoena and seemingly uncooperative could be questioned in secret, and in the absence of friend, counsel and the public, could be convicted. Even the mere admission of the press could be a boon to such a witness.

United States, 359 U. S. 41. If the judge goes to the grand jury room to deal with him, he may not even be entitled to counsel.[6] If now the right to a public trial should go, when and where is the line to be drawn?

II.

The presence of counsel throughout the courtroom proceedings did not make the hearing public.

While petitioner's counsel was present throughout the courtroom proceedings, it is, nevertheless, true that a "secret proceeding is no less secret because the defendant is allowed to have counsel" (Warren, Ch. J., *Brown* v. *United States*, *supra*, diss. op., fn. 15).

The evils inherent in a secret proceeding are not lessened or eradicated by the fact that counsel for the accused is also present. The opportunity for intimidation or persecution and the consequent possible abuse of judicial power remain. The advocate militant in such *in camera* proceedings may merely be another candidate for a contempt adjudication.

The Sixth Amendment requires not only that a defendant in a criminal prosecution have counsel, but also that his trial be public. Consequently the right to counsel is independent of that to a public trial. Nor can the right to a public trial be successfully equated with the right to counsel. The allowance of counsel to a defendant cannot be the equivalent of a public trial, nor under the Constitution can the converse be the equivalent of the allowance of counsel. Each is a basic and separate right.

Indeed in many cases convictions of crimes have been reversed, although not only did defendant have counsel

6. It is not inconceivable that he may be denied counsel, even if the Judge does not go to the grand jury room. See *Owens* v. *Dancy*, 36 F. 2d 882, 885 (C.A. 10).

present but members of the Bar and representatives of the press also were there.

In *Tanksley* v. *United States,* 145 F. 2d 58 (C.A. 9), the Court of Appeals reversed because of the denial of a public trial. Defendant's counsel was present in court along with relatives and the press. Although there was less secrecy in the *Tanksley* case, *supra,* than here the conviction was reversed.

Similarly, in *Davis* v. *United States,* 247 Fed. 394 (C.A. 8), all spectators were cleared from the courtroom, except relatives, members of the bar, newspaper reporters and defendant's attorneys. The Court of Appeals reversed.

In *United States* v. *Kobli,* 172 F. 2d 919 (C.A. 3), the court excluded from the courtroom all persons except jurors, witnesses, lawyers, members of the press and counsel for the defendants. The Court of Appeals reversed.

As the Court in the *Davis* case, *supra,* cogently pointed out, relatives, attorneys, witnesses or newspaper reporters are not "the exclusive representatives of the public." *A fortiori* the petitioner's counsel was not a representative of the public.[7]

Hence the mere presence of counsel does not make a criminal proceeding a public hearing. Consequently the secret proceeding in which petitioner was convicted of criminal contempt violated his constitutional rights and the conviction must be reversed.

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7. Examples of convictions reversed in State courts, because the trial was not public, although counsel was present, are: *State* v. *Hensley,* 75 Ohio 255; *People* v. *Murray,* 89 Mich. 276; *People* v. *Yeager,* 113 Mich. 228; *State* v. *Keeler,* 52 Mont. 205; *State* v. *Beckstead,* 96 Utah 528; *State* v. *Bonza,* 72 Utah 177; *State* v. *Osborne,* 54 Or. 289; *Neal* v. *State,* 86 Okla. Cr. 283.

In a Note, 49 *Col. L. Rev.* [1949], 110, 112, it is concluded that, under the cases, for criminal proceedings to be public, some persons other than court officers, jurors, parties to the controversy, witnesses and counsel must be present. Even in the minority of jurisdictions, less observant of the strict enforcement of the right to a public trial, especially in cases of a salacious nature, the presence of someone other than the participants in the trial is nevertheless required. *Ibid,* 114. See also 60 *Dickinson L. Rev.* [1955-56], 21, *et seq.*

III.

The non-objection by petitioner and his counsel to the exclusion of the public was not a waiver of the right to a public trial. This Court is not thereby precluded from considering the matter.

The record does not disclose that any specific objection was made to the clearing of the courtroom and the resulting exclusion of the public (R. 30). Nor was any exception at any time taken.[8]

It is respectfully submitted that the right to a public trial is so fundamental that the infringement thereof cannot be overlooked on review because of the failure of counsel or petitioner to raise it in the lower court. There was, moreover, no conscious express waiver by petitioner or his counsel of his constitutional right to a public trial. A public trial cannot be waived by non-objection or silence. *State* v. *Hensley*, 75 Ohio 255.

In *State* v. *Hensley, supra*, the court said:

> "It is, however, insisted by cousel for the state that, because no specific objection or exception was entered by the defendant at the time the order was made or was being enforced, the error, if any was committed, cannot now be taken advantage of. This objection ignores the force and effect of the constitutional provision. The right to a public trial is guaranteed. It is of the same high order of right as the other guaranties embodied in the section * * *."

See also *State* v. *Delzoppo*, 86 Ohio App. 381; *E. W. Scripps Company* v. *Fulton*, 100 Ohio App. 157; *People* v.

8. While it appears that throughout the proceeding petitioner's counsel sought a hearing on notice under Rule 42(b), which could only mean an open trial, no specific request was made for a public or open hearing. Nor was such request necessary, since the alleged contempt was not committed in open court. *Re Oliver*, 333 U.S. 257. See p. 20, *infra*.

Jelke, 308 N. Y. 56; *State* v. *Haskins*, 38 N. J. Super. 250; *Wade* v. *State*, 207 Ala. 1, 104; *Stewart* v. *State*, 18 Ala., App. 622; *State* v. *Marsh*, 126 Wash. 142. See Note, 49 *Columbia L. Rev.* [1949] 110, 118; 60 *Dickinson L. Rev.* [1955-56] 21, 29.

No serious consideration should be given to a contention that the right to a public trial can be surrendered in any manner other than as trial by jury in a criminal case may be waived. No preferment may be given to the right to jury trial over that to a public trial. Both rights are of the same ancient common law lineage. *Radin*, The Right To A Public Trial, 6 *Temple L. Q.* [1931-32] 381. Just as a jury trial cannot be foregone, except expressly and in an intelligent, conscious manner [Rule 23(a), Federal Rules of Criminal Procedure], so can only the right to a public trial be waived.

Rule 23(a), Federal Rules of Criminal Procedure, does not declare any new rule as to what is necessary to make effective a waiver of trial by jury. It merely reiterated the high standards established in prior cases.

Thus in *Patton* v. *United States*, 281 U. S. 276, 312, this Court declared that "the right of the accused to a trial by a constitutional jury" must "be jealously preserved" and that "before any waiver can become effective" there must be had "the express and intelligent consent of the defendant", the "consent of government counsel" and the "sanction of the court" and that "the duty of the trial court is not discharged as a mere matter of rote, but with sound and advised discretion". *Adams* v. *United States*, 317 U. S. 269, is to the same effect.

Similarly the right to counsel must be intelligently, consciously and competently waived by the accused. *Johnson* v. *Zerbst*, 304 U. S. 458.

Here indeed, in this case, under the standards set by this Court for the waiver of constitutional rights of equal rank, there was no waiver of the right to a public trial.

IV.

The petitioner is not required to show prejudice to him by reason of the deprivation of a public trial. Given the deprivation of this right, prejudice is presumed.

It is fundamental that where the right to a public trial has been denied, prejudice is presumed absolutely. *Davis* v. *United States*, 247 Fed. 394, 398 (C.A. 8); *Tanksley* v. *United States*, 145 F. 2d 58 (C.A. 9); *United States* v. *Kobli*, 172 F. 2d 919, (C.A. 3). See *People* v. *Jelke*, 308 N. Y. 56; *People* v. *Micalizzi*, 223 Mich. 580; *People* v. *Yeager*, 113 Mich. 228; *People* v. *Murray*, 89 Mich. 276; *State* v. *Keeler*, 52 Mont. 205; *Tilton* v. *State*, 5 Ga. App. 59; *State* v. *Beckstead*, 96 Utah 528; *State* v. *Bonza*, 72 Utah 177; *State* v. *Jordan*, 57 Utah 612; *State* v. *Haskins*, 38 N.J. Super. 250; *State* v. *Osborne*, 54 Or. 289; *People* v. *Hartman*, 103 Cal. 242; *People* v. *Byrnes*, 84 Cal. App. 2d 72; *Neal* v. *State*, 86 Okla. Cr. 283.

This is the rule applicable to any deprivation of constitutional rights and must be applied here.

V.

Petitioner's right to a public hearing accrued no later than the time when he was directed to take the stand by the District Court.

The proposition that only the adjudication and sentence on April 22, 1957 of petitioner for contempt was required to be public is untenable, because it has no relationship to the reality of what transpired. When on April 22, 1957

the court called petitioner to the stand (R. 38, 39) to put the questions to him and direct him to answer, it stated to petitioner's counsel that "we are proceeding in accordance with Rule 42(a)."

The court's language makes clear that it was proceeding under Rule 42(a) and that it considered that the proceedings about to be conducted by it were in substance and effect contempt proceedings.

It was, at the very least, if not earlier, when petitioner was called to the stand (R. 38, 39), that he was in jeopardy and that his right to an open hearing, as well as to all the other rights of a defendant in a criminal contempt cause, accrued.

At that point the court knew that petitioner had, despite its direction, continued his refusal to answer before the grand jury and the ultimate result had clearly been foreshadowed.

Whether it was, as the court designated it, a proceeding under Rule 42(a) or, as the Court of Appeals in the *Brown* case (247 F. 2d 332) described it, a proceeding ancillary to the grand jury, or, as this Court considered it in the *Brown* case (359 U. S. 41), a continuation of the grand jury proceeding, the fact is that the entire proceedings on April 22, 1957 (R. 30, *et seq.*) were a trial, because petitioner was in jeopardy of his liberty and in that event was entitled to have it conducted publicly.

A contention that the right to a public trial could only have accrued at the time of adjudication is contrary to reason and justice. It would reduce this right in this type of contempt case to an absurdity and a meaningless gesture, especially where the alleged contempt did not occur in open court. If the right to a public trial has a social purpose and function, then it is the proceedings which lead up to the conviction, whether of contempt or of any other crime, which require the admission of the

public. Certainly in a trial of a crime other than contempt no one would attempt to assert that the formal conviction of a defendant was all that was required to be public.

In effect in this proceeding prior to the adjudication, the court was ascertaining the facts upon which it would make its determination whether it should convict petitioner of contempt. The trial was all that went before the actual adjudication and the opening of these prior proceedings to the public was essential to constitute it a valid and constitutional proceeding.

The right to a public trial accrued to petitioner when he became in jeopardy of his liberty. On the record here it is clear that when he was brought down for the second time from the grand jury room to appear before the judge as a recalcitrant witness theretofore directed to answer, who had nevertheless once more refused to answer, and he was ordered to the stand, petitioner was then, under the procedure followed and approved in *Brown* v. *United States*, 359 U. S. 41, positively in jeopardy.

For then the proceeding immediately shifted from inquisitorial to punitive function which converted it from a grand jury investigation to a proceeding in criminal contempt (*Re Oliver*, 333 U. S. 257, 278, 279, Rutledge J.).

Beyond doubt this shift took place when petitioner was summoned to the witness stand in the courtroom and the court put the questions of the grand jury to him. The trial court itself considered that this conversion had then occurred because he said in response to counsel's question (R. 39) "We are proceeding in accordance with Rule 42(a)." The trial court's own picture of this proceeding was that this was a proceeding leading to a conviction or acquittal for criminal contempt; it was no longer inquisi-

torial—the questions were not put to petitioner for the purpose of obtaining the information for the use of the grand jury, but for the purpose of establishing a case punishable under Rule 42(a).

VI.

Since the alleged contempt was not committed in open court, it was a denial of Due Process summarily to convict petitioner in secret and without notice, charges and hearing.

But under Due Process petitioner's position is even more basic. It affects the trial court's power to punish petitioner summarily, as though for a contempt committed in the face and presence of the court, without notice or other compliance with Rule 42(b).

Such summary adjudication and punishment is Due Process only when the contumacious act is committed in "open court." *Cooke* v. *United States*, 267 U. S. 517, 536, 537; *Re Oliver*, 333 U. S. 257, 273-278. It is not enough to confer such summary jurisdiction that the wrongful act be committed in the face of the court.

As was made clear in *Cooke* v. *United States, supra*, 536, if the contempt is not in "open court", there is no right or reason to dispense with notice, charges and hearing. Due Process precludes such dispensation. ["Open court" in this context means public, *i.e.*, open to spectators. *Black's Law Dictionary* (2d Ed., 1910) 854; *United States* v. *Ginsberg*, 243 U. S. 472.]

Hence, in this case the court could not proceed summarily without notice, charges and hearing, since the alleged contempt was not committed in "open court", but in secret.

To constitute the action of the court here Due Process it was a necessary prerequisite that the calling of petitioner

to the stand, the putting to him of the questions and his refusal to obey the court's direction and to answer take place in "open court".

Petitioner was, therefore, denied Due Process, from the moment that in a secret proceeding against him as a recalcitrant grand jury witness he was called to the stand in the courtroom.

CONCLUSION

The judgment of conviction of petitioner for criminal contempt should be reversed and his acquittal directed.

Respectfully submitted,

MYRON L. SHAPIRO and
J. BERTRAM WEGMAN,
Counsel for Petitioner.

APPENDIX

Relevant Statutes

Federal Rules of Criminal Procedure:

Rule 42. Criminal Contempt

(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the fact and shall be signed by the judge and entered of record.

(b) *Disposition upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

United States Constitution, Amendments V and VI:

V.

"No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;"

VI.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense;"

the contempt occurred under the eye of the court. Since no trial of any sort is required for such a determination, the constitutional guaranty of a "public" trial has no application to proceedings under Rule 42(a).

B. The contempt adjudication, though made when the general public was excluded, did not have the injurious characteristics associated with "secret convictions". Admittedly, the courtroom in which petitioner's adjudication took place had, sometime prior to the adjudication, been cleared of the general public by order of the court, and this order, the propriety of which is not open to question, had not been rescinded at the time of the contempt adjudication. Petitioner's counsel, however, was present and active on behalf of petitioner throughout the proceedings, vigorously representing his interests. The proceedings were fully reported and subsequently spread on record; and there is no suggestion of any unfairness to the petitioner on the part of anyone. These circumstances make this case wholly unlike the secret conviction by a one-man judge-grand jury involved in *In re Oliver*, 333 U.S. 257. The contempt involved in *Oliver*, moreover, consisted of alleged perjury before the judge-grand jury and consequently involved sharply disputed issues of fact, whereas here there was no factual issue at all but only the legal question of whether petitioner's refusal to answer questions was lawful.

Petitioner was not denied due process because his summary adjudication was for a contempt not committed "in open court". The fact that the public was

excluded (for a proper reason) from the proceeding at which the contempt occurred had no material bearing on the propriety of the summary adjudication. It was the fact that the act of contempt was witnessed by the judge that made the case a proper one for summary adjudication.

C. Petitioner suffered no prejudice from the non-public character of the adjudication. The proceedings prior to the adjudication were properly non-public, being essentially a continuation of the grand jury inquiry. Especially in the absence of any objection on this score, petitioner was not prejudiced merely because the court did not dissolve the closed grand jury proceeding as such, and reopen the courtroom to the public for the purpose of listening to legal arguments it had already considered and of making the formal contempt adjudication. Moreover, petitioner's objection to the non-public character of the proceedings, first made on appeal, came too late.

ARGUMENT

THE ADJUDICATION OF PETITIONER IN CRIMINAL CONTEMPT WHILE THE ORDER EXCLUDING THE GENERAL PUBLIC FROM THE COURTROOM FOR THE GRAND JURY PROCEEDING WAS STILL IN EFFECT DID NOT INFRINGE ANY OF PETITIONER'S RIGHTS OR PREJUDICE HIM

A. PETITIONER WAS ENTITLED TO NO TRIAL AT ALL, SINCE HIS CONTEMPT WAS PROPERLY ADJUDICABLE SUMMARILY; THE "PUBLIC TRIAL" GUARANTY OF THE SIXTH AMENDMENT WAS ACCORDINGLY INAPPLICABLE

In *Brown* v. *United States*, *supra*, 359 U.S. 41, 47–52, this Court held, in a companion case (see *supra*,

p. 4, fn. 1, and p. 6), that where a witness before a grand jury commits contempt by refusing to obey a court order directing him to answer specific questions (thereby rendering himself liable to be proceeded against for contempt in accordance with the "notice and hearing" provisions of Rule 42(b) of the Federal Rules of Criminal Procedure), the judge may in his discretion give the witness another chance to answer the questions at a session of the grand jury presided over by the judge. Following this procedure, if the witness persists in refusing to answer (this time in the judge's actual presence), he may be summarily adjudicated in contempt in accordance with the "summary" procedure prescribed by Rule 42(a) (*supra*, p. 3). This holding, it is submitted, governs the outcome of this case as well.

Petitioner's basic contention—essentially his only contention now before the Court—is that the fact that his contempt adjudication was made under conditions of "secrecy" of a sort[*] deprived him of the right to a "public trial", which the Sixth Amendment grants to the accused in "all criminal prosecutions" (Br. 8-17). But in the case of a summary contempt adjudication under Rule 42(a) there is no trial at all; the essence of such a determination is precisely that no trial or hearing is required because the contempt occurred under the eye of the court. *Ex parte Terry*, 128 U.S. 289; *Cooke* v. *United States*, 267 U.S. 517, 534-535; *Sacher* v. *United States*, 343 U.S. 1, 9;

[*] As we point out *infra*, pp. 15-17, the secrecy at the time of the adjudication was of a wholly different kind from the sort typically associated with the idea of a "secret conviction".

Brown v. *United States*, *supra*, 359 U.S. at 51. At least where, as here, the question whether there has been a contempt involves no disputed factual issue (see *infra*, pp. 16–17), but solely a legal question (in this case, whether the refusals to answer were legally justified), a "trial"—in the ordinary sense of a hearing to ascertain whether a charged act of misconduct in fact took place—would be unnecessary, since the judge personally witnessed the conduct constituting the contempt. Under such circumstances, as this Court held in *Ex parte Terry*, *supra*, 128 U.S. at 309, it is competent for the district court, "immediately upon the commission, in its presence, of the contempt * * *, to proceed upon its own knowledge of the facts, and punish the offender, without further proof, and without issue or trial in any form".[11] And since trial of any sort may be dispensed with under such circum-

[11] The act of contempt involved in *Terry* was one of physical violence which interrupted the orderly conduct of a pending trial (assault on a marshal while he was carrying out an order of the presiding judge to remove a misbehaving person from the courtroom). But that the rule of that case is not limited to contempts of a violent nature which actually interrupt courtroom proceedings is clear from *Brown* v. *United States*, *supra*, 359 U.S. 41, where the rule was applied to an act of contempt consisting (as here) of a refusal to answer questions. The application of the rule in *Brown* was in accord with accepted principles, since the rationale of *Terry* was that it is superfluous for a judge who has personally witnessed the misconduct constituting the contempt to conduct a trial to determine whether it happened. Cf. *Sacher* v. *United States*, *supra*, 343 U.S. at 9. This is equally true regardless of the character of the act of misconduct in question, provided the contempt is one that is properly adjudicable summarily. As noted *infra*, pp. 14–15, not all contempts in the actual presence of the court can be proceeded against summarily.

stances, the constitutional guaranty of a "public" trial has no application to proceedings under Rule 42(a).

Moreover, it is plain that there are several situations in which punishment was intended by Rule 42(a), *supra*, p. 3, to be imposed, summarily and immediately, in the course of proceedings from which the public is properly excluded. A contempt in the presence of a judge holding a chambers conference or hearing on a case (*e.g.*, discussing a proposed charge to the jury), or committed at a bench conference outside the hearing of the jury and the public, can validly be adjudicated at that very moment. There is no prohibition, where the court proceeds summarily to punish a contempt in chambers or at the bench, against making the adjudication right then and there, without any trial or opening the proceedings to the world.

It is true that not all contempts committed in the face of the court are adjudicable summarily. In *Offutt* v. *United States*, 348 U.S. 11, for example, this Court held that where the acts of alleged contempt, though committed in the face of the court, are of such a nature as to make it desirable that the adjudication (if any) be made by another judge after notice and hearing, that procedure should be followed rather than the summary procedure prescribed by Rule 42(a).[*] In such a case the hearing would be in ac-

[*] In *Offutt*, the reason why it was thought desirable that another judge hear the charges and make the adjudication was the fact that the judge in whose presence the acts in question had occurred had become "personally embroiled" with the al-

cordance with Rule 42(b) and the accused, as in the case of the accused in any trial, would be entitled to have the hearing public. But where (as *Brown* establishes is the case here, 359 U.S. at 47–52) the contempt is properly adjudicable summarily under Rule 42(a), there is no right to a "public" trial because there is no right to any trial."

B. THE CONTEMPT ADJUDICATION, THOUGH MADE WHEN THE GENERAL PUBLIC WAS EXCLUDED, DID NOT HAVE THE INJURIOUS CHARACTERISTICS ASSOCIATED WITH "SECRET CONVICTIONS", NOR DID IT DEPRIVE PETITIONER OF DUE PROCESS

The questions presented (*supra*, p. 2) refer to the "secrecy of the proceedings" in which petitioner was adjudicated in contempt, and petitioner attempts to equate his contempt conviction to the kind of secret contempt conviction which this Court condemned in *In re Oliver*, 333 U.S. 257 (Br. 8–13). The cases, however, are wholly dissimilar.

The petitioner in *In re Oliver*, appearing as a witness before a state one-man judge-grand jury engaged in a secret investigation of crime, was summarily charged with and convicted of contempt for giving testimony believed by the judge-grand jury to be false on the basis of other testimony heard by the judge-

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legal contemnor (348 U.S. at 17). Cf. *Cooke* v. *United States*, *supra*, 267 U.S. 517, 539. Here (as in *Brown*) the record shows nothing in the nature of a personal or emotional embellishment on the part of the judge; on the contrary, the record shows that the judge maintained a calm and judicial composure at all times.

" As we point out *infra*, pp. 16–17, no issue of fact was involved in the contempt adjudication, but only the legal issue of whether petitioner's undisputed refusal to answer questions was lawful.

jury in the petitioner's absence; the entire proceeding was secret, the petitioner having no opportunity to secure counsel, prepare a defense, cross-examine the other witness, or summon witnesses to refute the charge against him.

The present case has little in common with *Oliver*. Admittedly, the courtroom in which petitioner's adjudication took place had, sometime prior to the adjudication, been cleared of the general public by order of the court. This order—the propriety of which is not open to question [12]—had not been rescinded at the time of the contempt adjudication. Petitioner's counsel, however, was present and active on behalf of petitioner throughout the proceedings, vigorously representing his interests every step of the way (*supra*, pp. 5–9). The proceedings themselves were fully reported and subsequently spread on the record; and there is no suggestion of any overreaching or unfairness to the petitioner on the part of the judge, government counsel, or any other person present. In *Oliver*, the contempt consisted of alleged perjury (and consequently involved sharply disputed issues of fact), but here there was no factual issue at all but only the legal question (since settled by *Brown*, 359 U.S. at 44–47) of whether petitioner's undisputed refusal to answer questions was lawful. The adjudication at bar is thus wholly unlike the secret

[12] Since the judge was about to conduct in the courtroom a grand jury session, to be presided over by him, at which petitioner was to be given another opportunity to answer the questions which he had previously refused to answer in the grand jury room, there can be no question as to the propriety of this order. Cf. *Brown* v. *United States*, *supra*, 359 U.S. at 43, 50.

conviction involved in *Oliver*, and has none of the odious features typically associated with a "secret conviction".

Likewise without merit is the contention (Br. 20–21) that the summary contempt adjudication denied petitioner due process because the contempt was not committed "in open court" (Br. 20), *i.e.*, in a proceeding open to the public. As we have pointed out (*supra*, p. 14), Rule 42(a), *supra*, p. 3, is not limited to contempts committed in "open" court; it applies to any contempt committed "in the actual presence of the court", as, for instance, in a chambers conference between the opposing counsel in a case and the judge, or at a bench conference between the attorneys and the judge (out of the hearing of the jury and the public). The fact that here the public was excluded from the proceeding at which the contempt occurred—for an entirely proper reason, as we have pointed out (see fn. 13, *supra*, p. 16)—had no material bearing on the propriety of the summary adjudication. The only significant consideration was that the act of contempt occurred in the actual presence of the court and was seen and heard by the judge. Since the issue of whether a contempt had occurred involved no factual question, but, as previously noted (*supra*, p. 16), solely an issue of law, the filing of a notice of charges and the holding of a hearing was not necessary.[14]

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[14] Petitioner's reliance on *Cooke* v. *United States*, 267 U.S. 517, on the due process aspect of his argument (Br. 20), is misplaced. Citing that decision and the previously discussed *Oliver* case (see *supra*, pp. 15–17), he argues that "summary adjudication and punishment is Due Process only when the contumacious act is committed in 'open court'" (*ibid.*). "It is not enough to

C. PETITIONER SUFFERED NO PREJUDICE FROM THE NON-PUBLIC CHARACTER OF THE ADJUDICATION, OF WHICH HE FIRST COMPLAINED ON APPEAL

The proceeding of April 22, 1957, in the cleared courtroom in the presence of the grand jury presided over by the judge (*supra*, pp. 5 *ff*) was essentially a proceeding to afford the petitioner a further opportunity—a *locus poenitentiae*—to comply with the court's direction that he answer the questions before the court faced the necessity of adjudicating him in contempt. *Brown* v. *United States*, *supra*, 359 U.S. at 50-52. If the petitioner ever had a right to have the courtroom reopened to persons in addition to his counsel, that right could only have arisen after it finally became apparent that, by virtue of his persistent refusal to testify, the inquiring function of the grand jury was thwarted and all that remained was the formal adjudication by the court of the contempt."

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confer such summary jurisdiction", he says, "that the wrongful act be committed in the face of the court" (*Ibid.*). The *Cooke* case is authority for no such distinction. On the contrary, the Court in that case used the phrases "under the eye or within the view of the court", "in open court", "in the face of the court", and "in *facie curiae*" interchangeably (267 U.S. at 536). In *Cooke* the act of contempt (the sending of an insulting letter to a judge in chambers) did not take place, as here, "in the face of the court" and "under the eye" of the judge, and it was for that reason that this Court held the procedure of summary adjudication to have been improperly invoked.

" Petitioner contends (Br. 17-20) that his "right to a public hearing accrued no later than the time when he was directed to take the stand by the District Court" (Br. 17) and that "the entire proceedings on April 22, 1957 (R. 30, *et seq.*) were a trial, because petitioner was in jeopardy of his liberty" (Br. 18). This argument misconceives the nature of those proceedings. As indicated in the text, the April 22d proceeding was designed to

Petitioned not only failed to assert any such right, either in person or by counsel, but he cannot in any manner show that he was prejudiced by the procedures which followed.

All that took place after the court stated that it would "listen to any reason why I should not [summarily] adjudicate this witness in contempt", as requested by counsel for the government after the petitioner's final refusal in the presence of the court and grand jury to answer the questions, was the reiteration by petitioner's counsel of his contentions that the immunity provision did not extend to petitioner and that any contempt proceeding against petitioner was required to be in accordance with Rule 42(b); the court then announced its adherence to its prior rulings (R. 43; *supra*, pp. 8–9). The adjudication of contempt (R. 43) and the sentence imposed (R. 45) immediately became matters of public record,

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give petitioner another opportunity to obey the court's order to answer the questions. It was essentially, as petitioner concedes that this Court held in the case of the corresponding proceeding in the *Brown* case, "a continuation of the grand jury proceeding" (Br. 18). Hence, when the judge directed petitioner to take the stand, the direction was given to him in his capacity as a grand jury witness, not as the accused in a contempt proceeding. Cf. *Brown*, 359 U.S. at 43, 50. The judge's remark that he was "proceeding in accordance with Rule 42(a)"—which he made in colloquy with counsel for petitioner after petitioner had been directed to take the stand (R. 39; see *supra*, pp. 7–8), and which petitioner cites as proof that the court considered the pending proceeding as a contempt proceeding (Br. 18, 19–20)—meant no more, when read in context, than that the judge *would* proceed under Rule 42(a) to punish petitioner for contempt if he persisted in his refusal to answer the questions after being given a further opportunity to do so.

and there was no attempt on the part of the court or government counsel to conceal the proceedings. Since the courtroom session of April 22d was essentially a continuation of the grand jury's meeting and was for that reason properly conducted in the absence of the general public, there was certainly no defect in the proceeding up to the moment the court announced that it would listen to argument why petitioner should not be adjudged in contempt (*supra*, pp. 16, 18–19). In these circumstances, and especially in the absence of any objection on this score, petitioner was not prejudiced merely because the court did not at that point dissolve the closed grand jury proceeding as such, and reopen the courtroom to the general public for the purpose of listening to the same legal arguments it had already considered and of making the formal contempt adjudication. This was the most that petitioner would have been entitled to, had he raised the point at all. Consequently, even if it be assumed *arguendo* that the failure of the court to reopen the courtroom to the public before pronouncing judgment constituted a defect in procedure, the defect was at most a matter of harmless error.[16] For the reasons previously stated, however, we do not concede that there was any error at all.

Finally, as we have seen (*supra*, p. 9), petitioner's objection was first made on appeal. It is submitted, therefore (particularly in view of the claimed error's

[16] See 28 U.S.C. 2111: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties".

non-prejudicial character), that the objection came, as the court of appeals held in regard to the similar objection in the *Brown* case, 247 F. 2d 332, 338–339, too late."[11]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

J. LEE RANKIN,
Solicitor General.
MALCOLM R. WILKEY,
Assistant Attorney General.
ROBERT S. ERDAHL,
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Attorneys.

FEBRUARY 1960.

[11] On Brown's appeal, the court of appeals, apparently assuming that the courtroom was closed to the public at the time of Brown's adjudication in contempt (though the record, as this Court later observed (359 U.S. at 51, n. 11), did not show that to be the fact), and noting the presence of Brown's counsel and his failure to object, held that Brown had "no standing to complain now" (247 F. 2d at 339).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 164

MORRY LEVINE,

Petitioner,

against

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully petitions for the rehearing of this Court's decision affirming his conviction for criminal contempt.

Rehearing should be granted for the following reasons:

I

The Court's opinion is grounded upon a misconstruction of the Record. The Court in its opinion (Slip Op., 8) held that "the act of contempt" was petitioner's "definitive refusal to comply with the court's direction to answer

the previously propounded questions", in that petitioner told the court that he would not, if sent back to the grand jury room, answer the questions (R. 42).

The Certificate of the District Judge (R. 3-5), however, shows very clearly and definitely that the contempt for which petitioner was convicted was his refusal in the sealed off courtroom in the presence of the District Judge to answer each of the questions enumerated (R. 4, 5), as each was put to him by the District Judge and directed to be answered.

The Certificate (R. 3-5) of the District Judge does not specify as an act of contempt petitioner's statement to the court that he would not answer the questions, if he were returned again to the grand jury room (R. 42)—the statement or act now characterized by this Court as the contempt. [Besides this response by petitioner could not be a contempt, since there was not then a direct order to him to return to the grand jury room and answer the questions.]

The adoption by this Court, as the act of contempt here, of petitioner's statement that he would refuse to answer, if sent back to the grand jury room, does serve the purpose of avoiding consideration of the most serious problem created by this Court's theory as to the time for petitioner's counsel to have objected to the secrecy.

If, as this Court holds, objection to the secrecy should have been made at or just prior to the time that the contumacious act was to be committed, then on the Record of this case the objection required by this Court had to be made at the time that petitioner was summoned to the stand in the courtroom by the District Judge (R. 38, 39).

On this Court's theory (Slip Op., 8) that, aside from petitioner's counsel, petitioner had no right to have the

general public present while the grand jury questions were being read to him by the District Judge, petitioner's right to a public hearing or trial has been completely eliminated in this case, because, even if he made the objection then (the time of the contempt for which he was convicted), there would be no obligation on the part of the District Judge to open the courtroom, since this Court holds the grand jury secrecy to be supervening.

Thus, while apparently holding that petitioner did have some non-illusory right to a public hearing, this Court has in effect pointed out the way for the complete elimination of any meaningful public hearing for recalcitrant grand jury witnesses facing a conviction for contempt.

II

Even if this Court should not correct the misconstruction of the Record and say, as it should, that petitioner's right to have the general public present is supervening to that of the secrecy of the grand jury and, accordingly, that at the time petitioner was called to the stand, the District Judge should have opened the courtroom doors, then the issue would remain within the frame work of this Court's theory whether such proper objection had been taken as disclosed by this Record.

It is respectfully submitted that such is the case. All members of this Court appear to agree that a Rule 42(b) proceeding means an open public session or trial; consequently it would seem to follow that, where a request is made, as here, for a Rule 42(b) proceeding instead of the so-called Rule 42(a) proceeding then being pursued, objection has been made to secrecy and a request made for a public hearing.

And so, when petitioner was summoned to the stand in the courtroom over the objection of his counsel (R. 38), exception was taken and objection was made to the procedure and request was made that the court "proceed in accordance with Rule 42(b)" (R. 39).

Can there be any doubt that at that point the imperative was upon the District Judge, who only a few minutes before that had closed the doors of the courtroom, to reopen the same to the public?

III

It is not amiss to point out that a consequential effect of this Court's holding here is the elimination of the right to a *"locus penitentiae"* only recently accorded to recalcitrant grand jury witnesses by this Court in *Brown* v. *United States*, 359 U. S. 41.

Under this Court's holding that the act of contempt here was the petitioner's statement that he would refuse to answer the questions, if sent back to the grand jury room, and not his refusal to answer each question when put to him by the District Judge, all that is now needed for an adjudicable contempt under Rule 42(a), when a recalcitrant grand jury witness is brought before the District Court for the second time, as here, is for the District Judge, after hearing the grand jury stenographer's transcription of her notes, to ask the witness whether he would answer, if sent back to the grand jury room, and for the witness to state that he would not. The dilution of the rights of witnesses, even the bare bone minimum under the *Brown* case, is now complete.

This court has, therefore, increased the possibility of grand jury witnesses subpoenaed summarily for forthwith

appearances being incarcerated for the long sentences now justified under the *Brown* case without word to or knowledge of kin or counsel—leaving aside the public.

IV

This Court in its opinion made no allusion to petitioner's argument that the summary adjudication and punishment of petitioner was not Due Process, because the contumacious act was not committed in "open court". *Cook* v. *United States,* 267 U. S. 517, 536, 537; *Re Oliver,* 33 U. S. 257, 273-278. Unless the contempt is committed in open court, Due Process absolutely precludes any dispensation with notice, charges and hearing.

It may be, perhaps, that no reference was made directly to this point, because it may have been believed that this question was resolved in *Brown* v. *United States, supra;* on the theory, mistakenly, that this was a "common issue" controlled by that case.

This Court in the *Brown* case, however, pretermitted the issue of secrecy and must, therefore, be deemed to have treated the contempt as one which occurred in open court. If it had considered it as one which occurred in secrecy, then it could and would at that time have considered the issue here raised. Thus, this aspect of the Due Process question in this case was not determined or decided by this Court in the *Brown* case.

The issue was arguable by the petitioner on the present writ of certiorari because it was clearly within Question No. "1" allowed by this Court on its grant of the writ (R. 48).

The issue whether objection, proper or improper, was taken, was and is immaterial on this point. The District Court could only have jurisdiction summarily to convict

petitioner of contempt without notice and hearing, if the act of contempt were committed in open court; if not committed in open court Due Process, in that ultimate sense which does not permit it to be admeasured by the characteristics or facts of a particular case, denies jurisdiction to the District Court to exercise its summary power under Rule 42(a).

CONCLUSION

The misconstruction of the Record, the dilution of *Brown* v. *United States*, the existence of proper objection, the plain absence of jurisdiction in the District Court summarily to adjudicate the petitioner in contempt, and all the other reasons herein require the grant of rehearing.

Respectfully submitted,

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Certificate

It is hereby certified that the foregoing petition for rehearing is presented in good faith and not for delay.

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